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OF THE COUNTY OF NEW YORK

* *

THE PEOPLE OF THE STATE OF NEW YORK

against

MAE WEST, ET AL.

* *

The People of the State of New York by Joab H. Banton, District Attorney, for their Bill of Particulars of the Indictment herein allege:

FIRST: That the defendants and each of them produced, presented and exhibited said play "The Pleasure Man" in the following capacities:

The defendant, Mae West, as author and director.

The defendant, Carl Reed, producer.

The defendant, Charles Edward Davenport, preparing and assisting in staging the play.

And the following defendants as actors of the following respective roles:

Stan Stanley	Stanley Smith
Alan Brooks	Rodney Terrill
Jay Holly	Tom Randall
William Augustin..	Steve McAllister
Camelia Campbell..	Dolores
Edgar Barrier.....	Ted Arnold
Elaine Ivans	Mary Ann
Leo Howe.....	The Bird of Paradise
Lester Sheehan....	Lester Queen
Wally James.....	Edgar "It" Morton
Martha Vaughn.....	Nell Morton
Ed Hearn.....	Toto
William Selig.....	Fritz Otto
Herman Lenzen.....	Herman Otto
Julia Childrey....	Flo)
Margaret Bragaw...	Bobby) Girls with Dolores
Anna Keller.....	Jewel) & Randall.
Jane Rich.....	Jane)
Frank Leslie.....	Bill
William Cavanaugh.	Bradley
Charles Ordway....	Peaches
Chuck Connors, II.	Chuck
Fred Dickens.....	Joe

Gene Drew ..... Bunny
Albert Dorando. Rene
Lew Lorraine... Ray
JoHuddleston... Billie
Walter MacDonald....Sonny
Gene Pearson .....The Male Jeritza
Howard Chandler ... The Varsity Kid
James F. Ayers ....Ripley Hetherington
Augusta E.Boylston. Mrs. Hetherington
Marguerite Leo ... Lizzie }
Kate Julianne .... Maggie } Scrubwomen
May Davis .... Tillie)
Edward Roseman ....Burbank, Chief of Police
Joe Delaney .... An officer
Robert Cooksey .... Sugarfoot.

Robert DeMarche
James Clark
Charles Zlatoff
George Cartier
Philip Kirschen
Philip Grossman
Richard Read
Fred Carlton (Guests at the party)
Jack Denton
Harry Boner
Rudolph Cormillo
Tommy Denton
Frank Rindhage
Frank Spenser

Kuni Hara .... Servant
Tod Lewis

SECOND:

The scenes, tableaux, incidents, parts, words, lines, passages and portions of The Pleasure Man charged to depict and deal with the subject of sex degeneracy and sex perversion.

a high falsetto voice. Stanley exclaims: "Why, its a convention." He then addresses one of these characters, saying: "What are you, a Jolson?" To which this character replies: "Jolson only sings a song on one knee. I sing it on two knees."

Three more of the same type of male characters afterward come on walking and talking in a very effeminate manner. Stanley says to the stage manager, McAllister (William Augustin): "I told you it was a convention. These are some more delegates."

Two other characters, Mr and Mrs Hetherington, (James F. Ayers and Augusta E. Boylston) are on the stage at this time. Mrs Hetherington, indicating these males, who are acting like "fairies", that is, male degenerates, says: "I cannot understand them they are so queer." He answers: "Yes, they are queer."

The word "Queer", when used in this connection, is well understood among perverts and people acquainted with their practises, to mean, that the persons designated as "queer" are male degenerates.

A little later in the same act, The Pleasure Man, (Rodney Terrill -- Alan Brooks) and Dolores (Camelia Campbell)

Gene Drew ..... Bunny
Albert Dorando. Rene
Lew Lorraine... Ray
JoHuddleston... Billie
Walter MacDonald....Sonny
Gene Pearson .....The Male Jeritza
Howard Chandler ... The Varsity Kid
James F. Ayers ....Ripley Hetherington
Augusta E.Boylston. Mrs. Hetherington
Marguerite Leo ... Lizzie }
Kate Julianne .... Maggie } Scrubwomen
May Davis .... Tillie)
Edward Roseman ....Burbank, Chief of Police
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Kuni Hara .... Servant
Tod Lewis

SECOND:

The scenes, tableaux, incidents, parts, words, lines, passages and portions of The Pleasure Man charged to depict and deal with the subject of sex degeneracy and sex perversion.

ACT I.

The scene between Bird of Paradise (Leo Howe) and Stanley Smith (Stan Stanley). Howe, a male character, playing the part of a female impersonator, and giving every appearance of being a male degenerate by his actions and manner of speaking, is asked by Stanley: "What kind of an act do you do?" Howe replies: "Oh, I get down on my knees. I am a female impersonator." Two more of these male characters, who, throughout the play act and give every outward evidence of being "fairies" or male degenerates, come on the stage, walking in an effeminate manner and talking in

a high falsetto voice. Stanley exclaims: "Why, its a convention." He then addresses one of these characters, saying: "What are you, a Jolson?" To which this character replies: "Jolson only sings a song on one knee. I sing it on two knees."

Three more of the same type of male characters afterward come on walking and talking in a very effeminate manner. Stanley says to the stage manager, McAllister (William Augustin): "I told you it was a convention. These are some more delegates."

Two other characters, Mr and Mrs Hetherington, (James F. Ayers and Augusta E. Boylston) are on the stage at this time. Mrs Hetherington, indicating these males, who are acting like "fairies", that is, male degenerates, says: "I cannot understand them they are so queer." He answers: "Yes, they are queer."

The word "Queer", when used in this connection, is well understood among perverts and people acquainted with their practises, to mean, that the persons designated as "queer" are male degenerates.

A little later in the same act, The Pleasure Man, (Rodney Terrill -- Alan Brooks) and Dolores (Camelia Campbell) are seated on a bench, engaged in a love scene. Two of these male characters hereinbefore alluded to, who are watching them, have the following dialogue. The first female impersonator: "Did you ever have a chronic love affair?" Second ditto: "Yes, but his wife found it out." These male characters were acting in a manner common to male perverts, walking and talking in a very effeminate way, were in male attire at the time they had this conversation, as were all the so-called female impersonators in this act.

A little later, two of the same characters go to the left of the stage. Stanley, who has been sweeping about with a broom, touches one of them in the backside with the broom.

This character thereupon gives a loud scream or whoop, in a high falsetto voice, and leaps off into the wings.

Two acrobats, Fritz Otto and Herman Otto, (William Selig and Herman Lenzen) come on the stage and have a conversation with Stan Stanley and McAllister. They explain that the third member of their troupe is injured, but they can put the act on. They go into an acrobatic performance, in the course of which Lenzen is attempting to balance Selig in the air, on his hands. When Lenzen enters, he has on a very wide pair of trousers, which are buckled tightly around the waist with a strap, but before the finale of this act, that is just at the point where he balances Selig on his hands, he loosens his belt and lets it drop to the floor. This causes his trousers, which are very wide, to sag out from his body in front. Then, while he is balancing Selig in the air, he lets them slip down, close to his body so that Selig's head and shoulders disappear inside of the trousers of Lenzen, bringing Selig's head to a point approximately where Lenzen's private parts would be located. Selig whose head and shoulders are buried in Lenzen's trousers, keeps moving his head about in the vicinity of Lenzen's private parts.

The curtain is rung down during this scene, which is the climax of the first act.

ACT II.

In this act, four of these so-called female impersonators, appear in one of the dressing rooms, change their costume and in doing so, strip to the waist, two or three of them wearing nothing above their waist but brassiers, and below, silk stockings and bloomers. After exhibiting themselves in this costume in their dressing room, they all put on kimonas and one of them begins to sew on a piece of white

material. Chuck Connors, II, comes on with his dancing partner, who is also one of these so-called female impersonators and who acts and talks in a very effeminate way, giving every outward appearance of being a male degenerate. They have a talk about their dance act. Connors' partner exits. Connors then talks with Stanley in which he says that the actions of his partner are queer to him. Connors also states that his partner has been with him for two weeks and has been making lamp shades during his off-time. Immediately after this remark, the partner comes back on the stage and Stanley asks him if he makes lamp shades. This character, who is walking and talking in a very effeminate manner, says to Stanley and Connors: "Yes, I make lovely lamp shades. Would you like to have/me make you one?" Stanley says: "Yes." And this character replies: "All right, I'll bring it up myself." Connors' dancing partner then leaves the stage and Stanley goes off the stage, also. In a short time, Stanley returns carrying a red lamp shade.

Lester Queen (Lester Sheehan) also one of the same type, so-called female impersonators heretofore alluded to, enters, walking and talking in the usual effeminate way, and meets The Bird of Paradise (Leo Howe) and tells Howe that a big party is being given that night by one Toto (Ed Hearn) and that everyone is invited. He also says: "You know what kind of a party he gives."

Four other so-called female impersonators come out of their dressing room and Sheehan tells them of the party. They all say that they will be present, one remarking, "I'll wear my Poiret gown." Sheehan then enters the dressing room of The Pleasure Man and invites him and Stanley to the party, saying to Stanley: "You are coming, aren't you,dear?" to which Stanley replies: "Yes, if I don't die."

Later in this act, Stanley runs upstairs, into the dressing room of the so-called female impersonators, and on opening the door, these male characters all scream in a loud, shrill, feminine voice.

At the climax of the second act, The Bird of Paradise Leo Howe, remarks to Brooks, The Pleasure Man, "If you are a man, thank God, I am a female impersonator."

ACT III

The scene of this act is at Toto's house. A number of these so-called female impersonators, that is, men dressed as women, and by their talk and actions giving every outward appearance of being male degenerates, are present, dancing with other males. Toto stands on a platform in the center of the stage, introducing various guests who sing and dance. He introduces one of these so-called female impersonators, a man dressed in woman's clothing, who sings a song entitled: "I am the Queen of the Beaches." This character is known as Peaches (Charles Ordway). He sings this song in such a manner that the last word of the sentence is slurred, so that it sounds like "I am the Queen of the Bitches." The innuendo or insinuation in this song is that the singer is the Queen of the Bitches or Fairies.

Another of these males in woman's attire, sings a song, containing the words: "What I had he took. I thought I would take it from him, but what I had he took." All this was sung in a manner of the so-called "fairy" and the innuendo contained in the lines is that the singer expected to perpetrate an act of sodomy on someone, but one was perpetrated on him.

Toto (Ed Henyn) sings two songs. The first song about "Cruising along the River looking for a Moon." The innuendo in this song is contained in the word "Moon" which in the language of "fairies" or male degenerates, means the penis or the head of the male penis, in erection.

Toto also sings another song, in which occur the words:"Officer let me pat your horse. Isn't it coarse? My, hasn't it grown since June?"

The word "horse", when used in this connection, means "male penis" and the innuendo contained in this song is that the singer desires to handle the male penis of the person he is singing it to.

This whole scene in Toto's apartment is a representation of a "drag" or "fairies' ball", that is, a ball given by male degenerates, in which they appear in female costume.

There are a large number of men in female attire on the stage, dancing with each other and with other men in male attire and by their speech and actions giving every outward appearance of being male degenerates.

THIRD: The words, lines and passages, together with a general description of the scenes, tableaux, parts and portions thereof, which are obscene, indecent, immoral and impure.

ACT I

The curtain rises on a scene depicting the back stage of a small town vaudeville theatre on Monday morning. There are four women on the stage scrubbing and a number of stage hands shifting scenery, etc.

The following dialogue takes place among the scrubwomen. The first scrubwoman, Lizzie, walks along the stage, wriggling her buttocks, which are very prominent. She says: "I have got it." The second scrubwoman, Maggie: "Yes, more than once." Lizzie: "Oh, I've had my time." Maggie:"Sure, with the whole Fire Department."

Stanley Smith (Stan Stanley) enters and converses with McAllister (William Augustin). Stanley is wearing one

black shoe and one brown shoe. McAllister, noticing this, says to him: "What is the idea of the different shoes?" Stanley answers:"The woman lied to me; said there was nobody home."

Other characters make their appearance for rehearsal, including Edgar Morton (Wally James) and Nell Morton (Martha Vaughn). Tom Randall, (Jay Holly) and his wife Dolores (Camelia Campbell) appear with their four dancing girls. (Julia Childrey, Margaret Bragaw, Anna Keller and Jane Rich).

Ted Arnold (Edgar Barrier) comes on and is engaged as an electrician. The Bird of Paradise (Leo Howe) enters. He is one of the male characters who afterwards appear in female attire. By his speech and manner, he gives every outward appearance of being a "fairy" or male degenerate. He is asked by Stanley: "What kind of an act do you do?" and replies: "Oh, I get down on my knees; I am a female impersonator."

Two other similar male characters, acting in the same way, enter and Stanley says: "Why, it's a convention." Addressing one of them, Stanley asks:"What are you, a Jolson?" to which this character replies: "Jolson only sings on one knee. I sing on two knees."

Mr and Mrs Hetherington (James Ayers and Augusta Boylston) enter, and The Pleasure Man comes on. His name in the play is Rodney Terrill (Alan Brooks). He engages in conversation with some of the girls, in the Dolores-Randall Act, putting his arms around them and caressing them, giving the impression that he is anxious to seduce every woman that he meets. He also meets Dolores, talks with her, kisses and caresses her; both sit on a bench on the stage.

Three more of these male characters, who act like male degenerates, enter. Stanley on seeing and hearing them, remarks to Augustin: "I told you it was a convention, there are some more delegates." Mr and Mrs Hetherington are present.

and Mrs Hetherington says: "I can't understand them, they are so queer" indicating the male characters walking and talking like women. Mr Hetherington says: "Yes, they are queer."

A little later in the same act, The Pleasure Man and Dolores are seated on a bench engaged in a love scene. Two of these male characters, who act and talk like fairies or degenerates are watching them and they have the following dialogue: First female impersonator: "Did you ever have a chronic love affair?" Second ditto: "Yes, but his wife found it out."

Later, as two of these same characters go off the stage, Stanley touches one of them in the backside with a broom, whereupon this man gives a loud scream or whoop, like a woman, in a high voice and leaps off into the wings.

Two acrobats, Fritz Otto and Herman Otto, (William Selig and Herman Lenzen) come on the stage and have a conversation with Stanley and McAllister. They explain that the third member of their troupe is injured, but they can put the act on. They go into an acrobatic performance, in the course of which Lenzen is attempting to balance Selig in the air, on his hands. When Lenzen enters, he has on a very wide pair of trousers, which are buckled tightly around the waist with a strap, but before the finale of this act, that is, just at the point where he balances Selig on his hands, he loosens his belt and lets it drop to the floor. This causes his trousers, which are very wide, to sag out from his body in front. Then, while he is balancing Selig in the air, he lets him slip down, close to his body so that Selig's head and shoulders disappear inside of the trousers of Lenzen, bringing Selig's head to a point approximately where Lenzen's private parts would be located. Selig whose head and shoulders are buried in Lenzen's trousers, keeps moving his head about in the vicinity of Lenzen's private parts.

The curtain is rung down during this scene, which is the climax of the first act.

ACT II.

The curtain rises on this act and discloses a scene showing a portion of the stage and four dressing rooms; two of the dressing rooms are on the stage level and two are upper rooms, with a stairway on the right leading to the upper rooms. The room lower right is the dressing room of Tirrell, his Japanese valet, Stanley, Selig and Lenzen. The room on the lower left is the dressing room of Dolores and Randall. Room upper right is the dressing room of The Bird of Paradise, four other males of the same type, that is, so-called female impersonators. The room upper left is the dressing room of the four dancing girls, Flo, Bobby, Jewel and Jane.

Shortly after the curtain goes up, four male characters (So-called female impersonators) dressed in female attire, come on the stage, go to the upper right dressing room, and assist each other in disrobing. They strip to the waist and are then attired in silk bloomers and silk stockings and are bare from the waist up with the exception that three of them wear brassiers around their chests. They all put on kimonas and one of them sits down and begins to sew on a piece of white material.

The four dancing girls enter the upper left dressing room in street attire, take off their outer garments, appearing in step-ins or bloomers and brassiers and proceed to make up.

Chuck Connors, II, appears on the stage with his dancing partner (another one of these so-called female impersonators). They have apparently just finished their act on the stage and talk about how the dance should have been done. Connors' partner then walks off the stage. Connors then talks with Stanley in the course of which Connors says: "that the

actions of his dancing partner are queer. Connors further says that he has been with him for two weeks and that he makes lamp shades during his off-time. Immediately after this remark, Connors' dancing partner comes back on the stage. He starts to go upstairs to the upper dressing room. Stanley asks him, at this time, if he makes lamp shades. Turning on the stairs and speaking in a very effeminate way, the dancing partner says: "Yes, I make lovely lamp shades. Would you like to have me make you one?" Stanley replies: "Yes." To which the dancing partner says: "All right, I' ll make you one and bring it up myself."

The character known in the play as Morton (Wally James) then comes on the stage, as if he had just finished his act and has the following dialogue with Stanley.

Stanley: "Did you make them laugh?"

Morton: "Why, there ain't a dry seat in the house."

Stanley afterwards goes off stage and in a short time returns with a red lamp shade. He then goes into the dressing room of The Pleasure Man, Tirrell, and they have a dialogue, as follows:

Stanley: "Did you every try Lydia Pinkham?"

Brooks: "No, I never played in the town she was in."

Stanley: "You remind me of one of her pills."

Brooks: "In what way?"

Stanley: "Take two and see what happens."

Lester Queen (Lester Sheehan) another of the so-called female impersonators, dressed in male attire, enters and meets The Bird of Paradise (Leo Howe). Sheehan tells of a big party to be given by Toto(Ed Hearn) and says that everybody is invited. He adds: "You know what kind of a party he gives."

The four so-called female impersonators who are in the upper dressing room come out on a balcony, in front of the room, and Sheehan tells them of the party and invites them to be there. They all promise to come. One of them says: "I

will wear my Poiret gown." Some of the others tell what gowns they will wear. Sheehan then enters the room of Brooks, The Pleasure Man, and invites Brooks and Stanley to the party. He says to Stanley: "You are coming, aren't you, dear?" Stanley replies: "Yes, if I don't die," placing his hand under his chin.

Mr and Mrs Hetheringon then come on the stage, as if their act was just finished, and complain about the reception that their act received. Mrs Hetherington leaves the stage, and Stanley talks with Mr Hetherington. Stanley says, in substance, "You ought to put more comedy into your act. The trouble with you is that you are living in 1890, and this is 1928. You are living in the hoop-skirt-days. Now, they get right down to the meat." In the course of this conversation, Stanley kicks Mr Hetherington on the backside at three different times.

Stanley then runs upstairs and opens the door of the dressing room of the so-called female impersonators. When he does so, they all scream in a loud, shrill, voice, like frightened women.

Stanley then goes into the next dressing room and has a scene with Julia Childrey, one of the dancing girls, who is alone in the dressing room and attired in her underclothes. He first excuses himself for coming in, says he might get into trouble for entering her dressingroom. Then has the following dialogue.

Stanley: "You won't say anything, will you?"

Flo: "No."

Stanley: "What is your name?"

Flo: "Flo."

Stanley: "Are you the girl who went to dinner with Tirrell?"

Flo: "Yes."

Stanley: "Then I can speak freely."

He then has a love scene with Flo (Julia Childrey)

in which he carresses her and kisses her passionately.He then leaves the dressing room and runs downstairs excitedly to his own room. Tirrell then says to Stanley: "What are you panting for? Been running?" Stanley: "No, boy, that's passion." 13

Ted Arnold (Edgar Barrier) enters the dressing room of Tirrell and admires the pictures of some of the women displayed therein. He suddenly sees that one of them is a picture of his own sister. Arnold asks who she is. Tirrell laughingly says that it's one of the girls in town that has been running after him. Arnold goes off the stage and shortly thereafter Arnold's sister, Mary Ann (Elaine Evans) comes into Tirrell's dressing room. She has a scene with Tirrell, in which it develops, by the dialogue, that she is the girl in the town, the original of the picture in Tirrell's room, and that Tirrell has seduced her and that she is now in trouble, that is, pregnant, and that she wants Tirrell to marry her. Tirrell spurns her, throwing her against the wall, and going out of the dressing room, she falls to the floor. A number of people rush in, among them, Arnold, who recognizes his sister, picks her up and takes her offstage. McAllister, (Augustin) asks what the trouble is and Tirrell comes on and says he found the girl on the floor with the Bird of Paradise bending over her. The Bird of Paradise(Howe) then acts as though Tirrell were accusing him of an immoral act, and that he resents it. McAllister tells all present to go to their dressing rooms. The Bird of Paradise then denounces Tirrell, The Pleasure Man, telling of all the things he knows about him, and ending with the remark,"If you are a man, thank God, I am a female impersonator."

Shortly after this scene, Tirrell goes into the dressing room of Dolores and Randall, Dolores having previously slipped a note to Tirrell under the door. Tirrell embraces and kisses Dolores passionately and Randall unexpectedly enters

the room and sees them. The two men fight. Everyone rushes on the stage. The curtain falls.

ACT III.

The curtain rises on a scene in Toto's home. The jazz band is playing on the left of the stage and there are about thirty or forty people present, including twelve or fifteen males of the type called female impersonators, that is, men dressed as women, and by their speech and actions having every outward appearance of being sex perverts or male degenerates. Some of these men are dancing with similar characters; others are dancing with men in ordinary street attire. Toto is on a platform in the center of the stage, toward the rear, and introduces various persons to entertain the party. Toto is in male attire, waring a Tuxedo suit, over which he has put on a silk mandarin coat. He introduces Peaches (Charles Ordway), one of these so-called female impersonators, who is dressed in woman's clothing. Peaches sings a song, the title of which is: "I am the Queen of the Beaches." He slurs the last word, so that the line sounds like "I am the Queen of the Bitches."

He introduces another male of this type who sings a song, the burden of which is"What I had he took. I thought I would take it from him, but what I had he took."

Toto (Ed Hearn) sings two songs. While he is in male attire, his manner, demeanor and actions are similar to that of the other so-called female impersonators. The first song is one about "Cruising along the River looking for a Moon." The second song he sings contains the refrain: in which he says: "Officer, let me pat your horse. Isn't it coarse? My, hasn't it grown since June."

The innuendoes contained in these various songs have already been set forth in this Bill of Particulars.

Mother Goddam (Harry Armand) does a Chinese specialty

dance number. The Cobra(Sylvan Repetti), another so-called female impersonator, does a dance. He is in female costume, his upper body bare with the exception of a brassiere. He wriggles his hips and belly and then lies on the floor and wriggles his body all around the floor like a snake.

Tirrell, The Pleasure Man, and Dolores are also at the party and Tirrell is devoting himself to Dolores. Randall enters, acting as though he were intoxicated and says he is looking for his wife and he knows she is there with The Pleasure Man. He does not see Tirrell and Dolores at this time and he is forcibly ejected. Tirrell and Dolores then have a scene alone on the stage in which Tirrell tries to persuade her to spend the night with him. He tells her that Toto has given him a room for that purpose. He says: "You promised me. My room is at the top of the steps. You can come up there and nobody will know it. If you don't make good, you're all washed up with me." She goes off the stage and he calls after her that he will expect her. After having a few drinks, Tirrell goes off upstairs to his room. Dolores returns a few minutes later, steals up to Tirrell's room, and in a few seconds gives a loud scream. Toto comes on, runs up to Tirrell's room, comes back in a short time, goes to the telephone and calls for the police, saying that something terrible has happened but that he cannot explain it over the telephone.

The curtain falls here to denote the lapse of two hours.

The curtain rises on the same scene and from the dialogue we learn that Tirrell, The Pleasure Man, has been murdered. A police official(Burbank--Edward Roseman) is questioning Stanley, Dolores, Randall, Toto, The Bird of Paradise and others. Burbank says: "Rodney Tirrell, The Pleasure Man, an actor, was the victim of some person as yet

unestablished. Death was due to an operation performed by someone who had knowledge of surgery and who used instruments with some degree of surgical skill." Thomas Randall, actor, has been placed under arrest on suspicion, based on circumstantial evidence."

Randall, who acts as though he were dazed or drunk, says that he does not remember what happened. The policeman then enters with Ted Arnold and says: "Chief, I think we have our man. He admits everything." Arnold then admits being responsible for Tirrell's death and says he did not intend to kill him. Arnold stated that Tirrell had ruined his sister and he wanted to deprive him from having any more pleasure with women and also to prevent him, Tirrell, from going about ruining every girl he met. He also stated that at one time he had studied surgery.

The innuendo and inference to be drawn from his words was that he had castrated Tirrell.

Stanley then says that Arnold was right. He says: "Tirrell was only a Pleasure Man." He also says:"I was sometimes envious of him, tried to follow him, but I thank God that I didn't."

This is the finale of the third act.

Dated, (September 28th, 1929)

Yours etc.,
JOAB H. BANTON,
District Attorney
New York County

To:
NATHAN BURKAN, Esq.,
Attorney for defendants
Office & Post Office Address
1451 Broadway
Borough of Manhattan, City of New York

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

17

JAMES GARRETT WALLACE, being duly sworn, deposes and says:

That he is an Assistant District Attorney of New York County and is in charge of the case, The People of the State of New York v. Mae West, et al.

That he has read the foregoing Bill of Particulars and knows the contents thereof.

That on information and belief he believes the said contents to be true.

Sworn to before me this

day of September, 1929

JAMES G. WALLACE

(Seal) EMIL KLINGE
notary public
New York County

information and belief, and that as to those matters he believes it to be true.

Sworn to before me, this
day of 19 .....

CORPORATION VERIFICATION

STATE OF NEW YORK, }
COUNTY OF } ss.:

, being duly sworn, deposes and says that

he is the of the herein

that he has read the foregoing

and knows the contents thereof, and that the same is true to h own knowledge, except as to the matters herein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by the is because the said

is a corporation, and deponent an officer thereof, to wit its

Sworn to before me, this
day of 19. .....

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK, }
COUNTY OF } ss.:

being duly sworn, deposes

and says that he is over the age of years; that on the

day of 19 , at No.

in the Borough of , City of , he served the foregoing

upon

in this action, by delivering to and leaving personally with said

a true copy thereof.

Deponent further says, that he knew the person served as aforesaid, to be the person mentioned and described in said

as the therein.

Sworn to before me, this
day of 19 .....

COURT OF GENERAL SESSIONS

COUNTY OF NEW YORK.

* *

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

-against-

MAE WEST, et al.,

Defendants.

* *

MOTION FOR BILL OF PARTICULARS

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of MAE WEST, verified November 17, 1928, one of the defendants herein, the undersigned will move this court at a Term for Motions in the Courthoom of General Sessions, Part I, held at the Criminal Courts Building, Franklin and Centre Streets, in the Borough of Manhattan, City of New York on the 22d day of November, 1928, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order granting the undersigned a bill of particulars of the matters alleged in the superseding indictment herein, with respect to the following items:

1. In what respects the said defendants and each of them, particularizing with respect to each and every of them, they and each of them prepared, advertised, gave, presented and participated in said play "Pleasure Man" and aided and abetted therein.

2. A particular description of the scenes, tableaux, incidents, parts and portions thereof which are obscene, indecent, immoral and impure.

3. The particular lines, passages, scenes, acts, tableaux, incidents, parts, portions, situations, episodes, characters, stage business, stage action, dances, stage movements, charged in the said indictment to be obscene, indecent, immoral and impure.

4. The exact words of the lines, passages, scenes, tableaux, parts and portions of said play charged to be obscene, indecent, immoral and impure.

5. A description of the incidents, situations, episodes, stage business, stage action, dances, stage movements, characters and characterization charged to be obscene, indecent, immoral and impure.

6. The scenes, tableaux, incidents, parts and portions of "Pleasure Man" charged to depict and deal with the subject of sex degeneracy and sex perversion.

7. The exact and precise language of the scenes, tableaux, incidents, parts and portions of said play depicting and dealing with the subject of sex degeneracy and sex perversion.

8. A particular description of the scenes, tableaux, incidents, parts and portions of "Pleasure Man", depicting and dealing with the subject of sex degeneracy and sex perversion.

9. What lines, passages, scenes and acts of said play dealt with sex degeneracy and sex perversion, specifying the same in detail.

10. The particular nature of the subject of sex degeneracy and sex perversion dealt with in said play, specifying the same in detail.

11. In what respects the defendants and each of them kept and maintained the Biltmore Theatre for the purpose of exhibiting and exposing the said play.

12. A particular description of the scenes, tableaux, incidents, parts and portions of said play, the situations, scenes, episodes, stage business, stage action, dances, stage movements, characters and characterization charged to be wicked, lewd, scandalous, bawdy, obscene, indecend, infamous, immoral and impure.

13. In what respects the defendants and each of them produced, presented and exhibited said play.

And for such other and further relief as to this court may seem just and proper.

Dated, New York, November 17, 1928.

Yours, etc.,

NATHAN BURKAN
Attorney for Defendants
other than Davenport
1451 Broadway
New York City.

To: JOAB H. BANTON, Esq.,
District Attorney
New York County.

COURT OF GENERAL SESSIONS OF THE

COUNTY OF NEW YORK.

* *

THE PEOPLE OF THE STATE OF NEW YORK

-against-

MAE WEST, CARL REED, CHARLES EDWARD DAVENPORT, STAN STANLEY, ALAN BROOKS, JAY HOLLY, WILLIAM AUGUSTIN, CAMILLA CAMPBELL, EDGAR BARRIER, ELAINE IVANS, LEO HOWE, LESTER SHERMAN, MARTHA VAUGHN, EDWARD HEARN, WILLIAM SELIG, HERMAN LENZEN, JULIE CHILDREY, MARGARET BRAGAW, ANNA KELLER, JAME RICH, FRANK LESLIE, WILLIAM CAVANAGH, CHARLES ORDWAY, CHUCK CONNORS the Second, FRED DICKENS, HARRY ARMAND, SYLVAN REPETTI, GENE DREN, ALBERT DORADO, LEW LORRAINE, JO HUDDLESTON, WALTER MacDONALD, GENE PEARSON, HOWARD CHANDLER, JAMES AYERS, AUGUSTA BOYLSTON, MARGUERITE LEO, KATE JULIANNE, MAY DAVIS, EDWARD ROSEMAN, JOE DELANEY, ROBERT COOKSEY, ROBERT DeMARCHE, JAMES CLARK, GEORGE CARTIER, PHILIP KIRSCHEN, PHILIP GROSSMAN, RICHARD READ, FRED CARLTON, BARRY BONER, RUDOLPH CORRILLO, TOMMY DENTON, FRANK RINDHAGE, FRANK SPENCER, KUNI HARA, WALLY JAMES, and TOD LEWIS,

Defendants.

* *

STATE OF NEW YORK,)
CITY OF NEW YORK,) SS.:
COUNTY OF NEW YORK,)

MAE WEST, being duly sworn, deposes and says:

I am one of the defendants named in the superseding indictment herein, which was handed down, as I am informed and believe on or about October 5, 1928.

There are fifty-seven defendants named in this superseding indictment (hereinafter referred to as the indictment), a copy of which is hereto annexed and made a part of this affidavit.

The indictment alleges three counts which briefly are as follows:

FIRST COUNT: The defendants are accused of the crime of unlawfully preparing, giving, directing, presenting and participating in an obscene, indecent, immoral and impure drama, play, exhibition, show and entertainment, and of unlawfully aiding and abetting such acts.

SECOND COUNT: The defendants are accused of unlawfully preparing, advertising, giving, directing, presenting and participating in an immoral play and exhibition, and certain scenes and parts thereof dealing with sex degeneracy and sex perversion, and of aiding and abetting in such acts.

THIRD COUNT: The defendants are accused of maintaining a public nuisance.

The First Count is alleged to be a violation of Section 1140a of the Penal Law and particularly of subdivision 1 of that section (more popularly known as The Wales Act.) That subdivision of Section 1140a reads as follows:

> "1. Any person who as <u>owner</u>, <u>manager</u>, <u>producer</u> <u>director</u>, <u>actor or agent or in any other capacity</u>, prepares, advertises, gives, directs, presents or participates in, any obscene, indecent, immoral or impure drama, play, exhibition, show or entertainment, or any obscene, indecent, immoral, impure scene, tableau, incident, part or portion of any drama, play, exhibition, show or entertainment, which would tend to the corruption of the morals of youth or others; or who,"

"The Second Count of the indictment is based upon subdivision 2 of Section 1140a, which subdivision reads as follows:

> "2. Prepares, advertises, gives, directs, presents or participates in, any drama, play, exhibition, show, entertainment, scene, or tableau depicting or dealing with, the subject of sex degeneracy, or sex perversion;"

"3. Every person aiding or abetting any such act, and every owner, lessee, or manager of any theatre, garden, building, room, place or structure, who leases or lets the same or permits the same to be used for the purposes of any such drama, play, exhibition, show or entertainment, or any such scene, tableau, incident, part or portion of any drama, play, exhibition, show or entertainment, knowingly, or who assents to the use of the same for any such purposes; shall be guilty of a misdemeanor.

In any case of a conviction for a violation of this section, where the violation occurred upon premises licensed for any public exhibition, drama, play, show or entertainment, the licensing authority shall have power to revoke such license upon proof of such conviction; and upon such revocation such licensing authority shall have power to refuse a new license affecting such premises for a period not exceeding one year from the date of such revocation."

The Third Count of the indictment is based upon Section 1532 of the Penal Law, which section reads as follows:

"Maintaining Nuisance.

A person who commits or maintains a public nuisance, the punishment for which is not specially prescribed, or who wilfully omits or refuses to perform any legal duty relating to the removal of such a public nuisance, is guilty of a misdemeanor."

I am an actress and a playwright by profession, and am a member in good standing of the Actors Equity Association, an association comprised exclusively of players and performers devoted to the legitimate stage.

In its membership are the most respectable, distinguished and eminent men and women in the theatrical profession. It enrolls such outstanding figures as Ethel Barrymore, John Barrymore, Lionel Barrymore, George Arliss, and others too numerous to mention.

Each and every of the defendants named in the indictment, with the exception of Reed and Davenport, are members of the Actors Equity Association, and as far as I know

are in good standing in such association and are of good moral character.

The play was represented as having been written by me, and my sole interest in the play was that of authoress, receiving a royalty from its performances. Such is the usual, ordinary and customary arrangement between authors of plays and producers.

The play was rehearsed and staged by Charles W. Davenport, who acted as stage director of this play, but who left the company and had no more to do with it since prior to its first performance, which took place at the Bronx Opera House, County of the Bronx, on the 17th day of September, 1928.

The producer and manager of the play was Carl Reed.

The theme and plot of the play are clean and decent.

The play is not obscene, indecent, immoral or impure, nor does such play contain any obscene, indecent, immoral, impure scene, tableau, incident, part or portion which would tend to the corruption of the morals of youth or others, nor does the play nor any scene or tableau thereof depict or deal with the subject of sex degeneracy or sex perversion, nor was such play or any part thereof a public nuisance.

The premier or the very first performance of the play took place at the Bronx Opera House in the Borough of Bronx, City of New York, on the 17th day of September, 1928, and said play was continuously performed every night thereafter during that entire week and on the Wednesday and Sat-

urday matinees of that week.

I am informed and verily believe that the Honorable William J. McGeehan, District Attorney for Bronx County, attended the performance of such play for the purpose of ascertaining whether or not such play violated the Penal Law or any part thereof.

The performance which Mr. McGeehan witnessed was identically the same performance which was given in New York County, for which we were indicted.

Mr. McGeehan directed the elimination of a song, which song was eliminated, and the play was permitted to be performed in such Opera House in Bronx County for eight continuous performances without molestation, arrest or interference of any name, nature or character.

Upon the conclusion of the engagement at that Opera House, the attraction was booked for the week commencing September 24, 1928, at the Boulevard Theatre, Jackson Heights, Queens County. Such attraction was performed identically the same way as the performance for which we were indicted and was presented publicly for eight performances during such week; that is, during each night and on the Wednesday and Saturday matinees of that week, without molestation, interference or arrest of any kind.

The said play was advertised for the first public performance at said Biltmore Theatre in the County of New York on the evening of October 1, 1928. A squad of police entered the theatre and took stations at various places in the theatre during the early part of the evening, and practically took possession of the stage, at a little after ten

o'clock. They informed the players that at the conclusion of the performance all hands would be taken to the police station.

I was not a performer in this play. I was then and still am appearing in a play called "Diamond Lil" at the Royale Theatre on West 45th Street, New York City.

Accordingly, at the conclusion of the performance the players were all taken into custody. The arrest was spectacular; the press of the City was well represented and on the scene with its paraphernalia - the camera and the flashlight. They were used to graphically and vividly record the event for subsequent reproduction in the press.

On the following day, October 2, 1928, all the defendants with the exception of Davenport and Reed were arraigned before Magistrate Weil at the Seventh District Police Magistrate's Court, on West 54th Street, Borough of Manhattan, City of New York.

The defendants were represented by Nathan Burkan, Esq., as their counsel, and were ready to proceed with a hearing. The People were unable to go on because of the absence from the City of the Honorable James G. Wallace, Assistant District Attorney, to whom was to be assigned the prosecution of this case.

Accordingly, the hearing was adjourned until the 4th day of October, 1928, at 2 p.m.

On or about the 3d day of October, 1928, the defendants, through their counsel Nathan Burkan, were informed that the hearing before the Police Magistrate was to be abandoned, and the matter submitted to the Grand Jury for indict-

ment. Accordingly, the matter was submitted to the Grand Jury, and an indictment was found against the players, including the defendants Davenport, Reed and myself, on the 4th day of October, 1928.

This indictment was found without a preliminary examination or hearing in the Magistrate's Court.

The indictment does not state the alleged obscene, indecent, immoral or impure matter which these defendants are charged with presenting, and likewise the indictment does not state the words, acts or substance of the alleged sex degeneracy or sex perversion with which the said play is alleged to deal. The indictment merely gives the pleaders' conclusion therefrom in the form of most glittering generalities, and it excuses a statement of the alleged obscene, indecent, immoral and impure matter, and the matter alleged to constitute a treatment of sex degeneracy and of sex perversion, by averring that the play would be offensive to the court and improper to be spread upon the records thereof.

Defendants made a motion on or about October 12, 1928, for an inspection of the minutes of the Grand Jury. Said motion came on to be heard before Judge Koenig in General Sessions, Part I, and was denied.

The defendants having been denied a preliminary examination or a hearing before a Magistrate, and the indictment lacking specification of the matter alleged to be criminal, and defendants having been denied an examination of the minutes of the Grand Jury, it is necessary for me, as well as the other defendants, that the People furnish a Bill of Particulars of the items specified in the notice of motion herein.

I do not know what parts of the play are charged to be lewd and indecent, or what parts are charged to treat with sex degeneracy or sex perversion.

I cannot safely proceed to trial and cannot prepare my defense herein without such Bill of Particulars.

The vague and indefinite language of the indictment furnishes me with no information with respect to the items sought.

I therefore pray for an order directing the People to serve upon me a bill of particulars of the items specified in the notice of motion herein; and for such other and further relief as to this court may seem just and proper.

Sworn to before me this

17th day of November,1928.

SUPERSEDING INDICTMENT

COURT OF GENERAL SESSIONS OF THE

COUNTY OF NEW YORK.

- -

THE PEOPLE OF THE STATE OF NEW YORK

-against-

MAE WEST, CARL FRED, CHARLES EDWARD DAVENPORT, STAN STANLEY, ALAN BROOKS, JAY HOLLY, WILLIAM AUGUSTIN, CAMILLA CAMPBELL, EDGAR BARRIER, ELAINE IVENS, LEO HOWE, LESTER SERRERAS, MARTHA WADDELL, EDWARD MAARS, WILLIAM SELLIO, HERMAN LINZNER, JULIA CHILDREY, MARGARET BRAGAW, ANNA KELLER, JANE RICH, FRANK LABELLE, WILLIAM CAVANAGH, CHARLES ORDWAY, CHUCK CONNORS the Second, FRED LICCIONE, HARRY ARMAND, SYLVAN REPETTI, GENE DRAB, ALBERT DORANDO, LEW LORRAINE, JO ABBOTT-TON, WALTER MacDONALD, GENE PEARSON, HOWARD CHANDLER, JAMES AYERS, AUGUSTA BOYLSTON, MARGUERITE LEO, KATE JULIANNE, MAY DAVIS, EDWARD ROSEMAN, JOE DELANEY, ROBERT COOLEY, ROBERT DeMARCEL, JAMES CLARK, GEORGE CARTIER, PHILIP KINSCHER, PHILIP GROSSMAN, RICHARD READ, FRED CARLTON, HARRY BONER, RUDOLPH CORNILLO, TOMMY DENTON, FRANK KINDRAGE, FRANK SPENSER, KUNI HARA, WALLY JAMES, TOD LEWIS

DEFENDANTS.

- -

THE GRAND JURY OF THE COUNTY OF NEW YORK, by this indictment, accuse THE SAID DEFENDANTS of the Crime of UNLAWFULLY PREPARING, ADVERTISING, GIVING, DIRECTING, PRESENTING AND PARTICIPATING IN AN OBSCENE, INDECENT, IMMORAL AND IMPURE DRAMA, PLAY, EXHIBITION, SHOW AND ENTERTAINMENT, committed as follows:

The said defendants, on the first day of October, nineteen hundred twenty-eight, and for some time thereafter, at a certain building and theatre in said county situate and known as the Biltmore Theatre, unlawfully did prepare, advertise, give, present and participate in an obscene, indecent, immoral and impure drama, play, exhibition, show and entertainment, and

obscene, indecent, immoral, impure scenes, tableaux, incidents, parts and portions of said obscene, indecent, immoral and impure drama, play and exhibition, which said obscene, indecent, immoral and impure drama, play, exhibition, show and entertainment was then and there called "PLEASURE MAN", a more particular description of which said obscene, indecent, immoral and impure drama, play, exhibition, show and entertainment and said scenes, tableaux, incidents, parts and portions thereof would be offensive to this Court and improper to be spread upon the records thereof, wherefore such description is not here given, which said drama, play, exhibition, show and entertainment and said scenes, tableaux, incidents, parts and portions thereof tend and at all times herein mentioned tended and would tend to the corruption of the morals of youth and others, and in such acts unlawfully each other the said defendants did aid and abet; against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

SECOND COUNT --

AND THE GRAND JURY AFORESAID, by this indictment, further accuse THE SAID DEFENDANTS of the Crime of UNLAWFULLY PREPARING, ADVERTISING, GIVING, DIRECTING, PRESENTING AND PARTICIPATING IN AN IMMORAL PLAY AND EXHIBITION, committed as follows:

The said defendants, on the day and in the year aforesaid, in the county aforesaid, unlawfully did prepare, advertise, give, direct, present and participate in a certain exhibition, show and entertainment, being the same exhibition, show and entertainment described in the first count of this indictment, to which reference is hereby made, and

certain scenes and tableaux in said exhibition, show and entertainment, all then and there depicting and dealing with the subject of sex degeneracy and sex perversion, and in such acts unlawfully each other the said defendants did aid and abet; against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

THIRD COUNT --

AND THE GRAND JURY AFORESAID, by this indictment, further accuse THE SAID DEFENDANTS of the Crime of MAINTAINING A PUBLIC NUISANCE, committed as follows:

The said defendants, on the day and in the year aforesaid, in the county aforesaid, contriving and wickedly intending so far as in them lay, to debauch and corrupt ~~the~~ the morals of youth and of other persons and to raise and create in their minds inordinate and lustful desires, unlawfully, wickedly and scandalously did keep and maintain a certain theatre and playhouse there commonly known as the Biltmore Theatre for the purpose of exhibiting and exposing to the sight of any persons willing to see and desirous of seeing the same and of paying for admission into the said theatre, a certain wicked, lewd, scandalous, bawdy, obscene, indecent, infamous, immoral and impure exhibition, show and entertainment, being the same exhibition, show and entertainment described in the first count of this indictment, to which reference is hereby made, and in the said theatre, at the time aforesaid, did unlawfully, wickedly and scandalously, for lucre and gain, produce, present, exhibit and display the said exhibition, show and entertainment to the sight and view of divers and many people, all to the great offence of

public decency, against the order and economy of the state and to the common nuisance of all the people, and against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

JOAB H. BANTON,

District Attorney.

"PLEASURE MAN"

ACTORS	SALARY
J. F. Ayers	$50.
Camilla Campbell	150.
Alan Brooks	400.
Mr. and Mrs. Stanley	400.
Anna Keller	25.
Wm. Cavanagh	35.
Augusta Boylston	25.
Wally James	150.
Edgar Barrier	65.
William Augustin	100.
Elaine Ivans	75.
Margaret Bragaw	30.
Jane Rich	25.
Jay Holley	100.
Martha Vaughan	75.
Fred Dickens	35.
Chuck Connors, Jr.	40.
Ed Roseman	50.
Kate Julianne	35.
Marguerite Leo	35.
May Davis	35.
William Selig	100.
Herman Lenzen	150.
Indiana "5" Band	625.
Harry Armand	35.
Leo Howe	75.
Lester Sheehan	100.

(Continued)

ACTORS	SALARY
Ed. Hearn	$35.
Charles Ordway	35.
Gene Drew	30.
Jo Huddleston	30.
Walter MacDonald	30.
Philip Crossman	25.
Frank Rindhage	25.
Robert De March	25.
Jack Denton	25.
Richard Read	25.
Fred Cralton	25.
Harry Boner	25.
Rudolph Cormillo	25.
George Cartier	25.
Albert Dorando	25.
James Clarke	25.
Sylvan Repetti	40.
Lew Lorraine	35.
Gene Pearson	100.
Howard Chandler	35.
Phillip Kirschen	25.
J. Kunihara	35.
Joe Delaney	15.

COURT OF GENERAL SESSIONS

COUNTY OF NEW YORK.

* *

PEOPLE OF THE STATE OF NEW YORK

-against-

MAE WEST, et al,

Defendants.

* *

MEMORANDUM ON MOTION FOR FURTHER BILL OF PARTICULARS

This is a motion for a further bill of particulars respecting the following items:

"1. The words, lines and passages, together with a general description of the scenes, tableaux, parts and portions thereof which are obscene, indecent, immoral and impure.

"2. The scenes, tableaux, incidents, parts, words, lines, passages and portions of 'Pleasure Man' charged to depict and deal with the subject of sex degeneracy and sex perversion.

"3. In what respects the defendants and each of them produced, presented and exhibited said play."

Pursuant to an order of this court dated June 18, 1929, the District Attorney served a bill of particulars with respect to such of these matters as were then available to him. The order reserved the right to the District Attorney to adduce additional proof or other particulars than those therein set forth upon the trial of the indictment, which were not then available to the District Attorney for the purpose of prepating and furnishing the bill of particulars ordered by the court at that time.

The trial of this case has been set down for

February 17, 1930.

The defendants cannot properly prepare for this trial unless they are informed of the exact particulars in which they are alleged to have violated the statute.

There are fifty-seven defendants.

The indictment contains three counts, which are as follows:

FIRST COUNT: The defendants are accused of the crime of unlawfully, preparing, giving, directing, presenting and participating in an obscene, indecent, immoral and impure drama, play, exhibition, show and entertainment, and of unlawfully aiding and abetting such acts.

SECOND COUNT: The defendants are accused of unlawfully preparing, advertising, giving, directing, presenting and participating in an immoral play and exhibition, and certain scenes and parts thereof dealing with sex degeneracy and sex perversion, and of aiding and abetting such acts.

THIRD:COUNT: The defendants are accused of maintaining a public nuisance.

The First Count is alleged to be a violation of Section 1140a of the Penal Law and particularly of subdivision 1 of that section (more popularly known as The Wales Act). That subdivision of Section 1140a reads as follows:

> "1. Any person who as owner, manager, producer, director, actor or agent or in any other capacity, prepares, advertises, gives, directs, presents or participates in, any obscene, indecent, immoral or impure drama, play, exhibition, show or entertainment, or any obscene, indecent, immoral, impure scene, tableau, incident, part or portion of any drama, play, exhibition, show or entertainment, which would tend to the corruption of the morals of youth or others; or who,"

The Second Count of the indictment is based upon subdivision 2 of Section 1140a, which subdivision reads as follows:

> "2. Prepares, advertises, gives, directs, presents or participates in, any drama, play, exhibition, show, entertainment, scene, or tableau depicting or dealing with, the subject of sex degeneracy, or sex perversion;"
>
> "3. Every person aiding or abetting any such act, and every owner, lessee, or manager of any theatre, garden, building, room, place or structure, who leases or lets the same or permits the same to be used for the purposes of any such drama, play, exhibition, show or entertainment, or any such scene, tableau, incident, part or portion of any drama, play, exhibition, show or entertainment, knowingly, or who assents to the use of the same for any such purposes; shall be guilty of a misdemeanor.
>
> "In any case of a conviction for a violation of this section, where the violation occurred upon premises licensed for any public exhibition, drama, play, show or entertainment, the licensing authority shall have power to revoke such license upon proof of such conviction; and upon such revocation such licensing authority shall have power to refuse a new license affecting such premises for a period not exceeding one year from the date of such revocation."

The Third Count of the indictment is based upon Section 1532 of the Penal Law, which section reads as follows:

> "Maintaining Nuisance.
>
> "A person who commits or maintains a public nuisance, the punishment for which is not specifically prescribed,or who wilfully omits or refuses to perform any legal duty relating to the removal of such a public nuisance, is guilty of a misdemeanor."

The indictment fails to specify which parts of the play "Pleasure Man" are claimed to be obscene, indecent, immoral and impure. It fails to specify in what respect this play and its scenes and tableaux depicted and dealt

with the subject of sex degeneracy and sex perversion, and it fails to specify in what way the said play was so wicked, lewd, scandalous, bawdy, obscene, indecent, infamous, immoral and impure, that it constituted a common nuisance.

The reason assigned in the indictment for the failure to allege any of the specific details is that "the said scenes, tableaux, incidents, parts and portions thereof would be offensive to this court and improper to be spread upon the records thereof."

The defendants cannot properly prepare their defense if the District Attorney is permitted to make one allegation in his bill of particulars and to prove entirely different matters at the trial.

In view of the general nature of the indictment, the defendants are entitled to a bill of particulars of the exact charges which they will be compelled to meet at the trial.

Originally, it was necessary to set out in an indictment the very language which was alleged to be obscene. If, under any circumstances, an indictment should omit such matter, it was held to be fatally defective, upon demurrer or motion in arrest of judgment.

Bradlaugh v. Regina, 32 Q.B.D. 607;

State v. Hansen, 23 Tex. 232;

People v. Hallenbeck, 52 How. Prac. 502.

In Bradlaugh v. Regina, supra, an indictment for publishing an obscene book identified the subject-matter merely by setting out its title, as in the case at bar. After a verdict of guilty, the court reversed the convic-

tion, holding that such an indictment is fatally defective, unless it sets out the very words alleged to be obscene.

Lord Bramwell was quite aware of the possible prejudice which might result to the defendant when he remarked that where the book as a whole is charged as an offense, the defendant cannot tell what passages will be selected as those on which the charge is to be supported. This defect was held not to be cured by a verdict of guilty.

It cannot be claimed that a statement in an indictment to the effect that certain matter is obscene, constitutes a description of such matter.

In the words of Lambert, J., speaking for the Appellate Division, First Department, in McNamara v. Goldan, 118 App. Div. 221, 223:

> "The mere characterizing of such letters as obscene by the pleader is not an allegation of fact, but a conclusion from the facts, * * * "

In the English courts of the present day, the prosecution is compelled to file with the indictment a copy of the alleged obscene matter "together with particulars shewing precisely by reference to pages, columns, and lines in what part of the book, newspaper, or other document the alleged libel is to be found, and such particulars shall be deemed to form part of the record". This is provided for in the English Law of Libel Amendment Act 1888 (51 & 52 Vict. c. 64, s. 7).

In People v. Danihy, 63 Hun 579, at p. 581:

> "The pleading must show on its face - its truth being conceded - that the cause of action exists, or the crime has been committed. It is not enough to allege a conclusion of fact; the facts themselves must be alleged from which the conclusion may be drawn; and in a case like the present it is not enough to char-

acterize the publication complained of, but the contents of the publication must be set forth in order that it may appear on the face of the pleading that it is of the character charged.

"The rule which has always held in actions of libel, either civil or criminal, is applicable to this case. A complaint or indictment which only charged that the written or printed matter complained of was libelous or defamatory would certainly be bad, not because of a failure to identify the matter, but because it did not appear on the face of the pleading that it was libelous or defamatory. And so the two classes of actions or prosecutions have always been classed together for the purposes of this rule; and it has been held, with great strictness, that in all actions, civil and criminal, in which the cause of action or offense consists in the publication of written or printed matter, the words complained of must be set out in the complaint or indictment."

In Lambert v. The People, 9 Cowan 578, the court said at p. 586:

"The general principle that every man is entitled to a specification of the charge against him, is so deeply engrafted in our criminal law, and is so essential to the enjoyment and protection of personal liberty in a free country, that it must be a waster of time to enforce it by argument or authority. The rule, founded upon this principle, as given by an excellent modern writer on criminal law (Mr. Chitty, in his 1st vol., p. 169), is, that 'every indictment must contain a certain description of the crime of which the defendant is accused, and a statement of the facts by which it is constituted, so as to identify the accusation, lest the grand jury should find a bill for one offense, and the party be put upon his trial for another, without any authority.' This simple and plain rule is so agreeable to common sense and common justice, that it needs not any authority to support it. But authorities are abundant, and it may safely be assumed as universal. The apparent exceptions are few. One of them is the case of an indictment for being a common barrator, in which, from the difficulty of specifying particular instances on the record, a generality of form is allowed; but the evil is remedied by the court's requiring from the prosecutor a bill of particulars of the instances of barratry intended to be proved on the trial; so that, in truth, even this case, is not an ex-

<u>ception to the rule. The cases of indictments against common scolds, houses of ill-fame, common nuisances, &c., partake of the subject, and must necessarily be as general as that is, and do not contravene the rule."</u>

And at p. 593:

"Such indictments as that now under consideration, are, in my judgment, directly hostile to these great features of our criminal law. They open the way to general and indefinite charges; they surprise the defendant; they afford no means of determining whether they have been legally found; they deprive the accused of the right of reviewing them, and leave him at the mercy of a public prosecutor."

In People v. Albow, 140 N. Y. 130, the Court of Appeals held an indictment bad which did not sufficiently charge a violation of the then Section 527 of the Penal Code. Chief Judge Andrews said at p. 134:

"But the rule that the offense must be charged in plain and intelligible language, and that the indictment must set forth all the essential elements of the crime, is and ought to be preserved alike for the protection of the accused and in the interest of the certain and orderly administration of the criminal law. It was said by Mr. Justice Field, in United States v. Hess (124 U. S. 483), in the case of an indictment under a statute of the United States for a fraudulent use of the mails, where essential facts were not averred, 'no essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication, and the charge must be made directly and not inferentially, or by way of recital.' This is a sound exposition of the principle governing criminal pleadings, which was disregarded in framing the indictment in the present case."

The indictment in the case at bar does not charge any particulars whatsoever. When the charges of an indictment are so general that they do not advise the defendant of the specific acts of which he is accused, the court should direct that a bill of particulars be furnished him, so that he may properly direct his defense.

In United States v. Adams Express Co., 119 Fed. 240, the court said at p. 242:

> "In this case it was apparent from the general terms of the indictment * * * and from the crime charged, although the indictment was sufficient in law, that a bill of particulars ought to be filed."

The defendants have no means of knowing what passages are claimed to be obscene. An inspection of the minutes of the Grand Jury has been denied them. The indictment fails to give any clue.

In United States v. Cruikshank, 92 U. S. 542, the court said at p. 558:

> "It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species, - it must descend to particulars. 1 Arch. Cr. Pr. and Pl., 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances."

The indictment did not give any clue to the defendants of the particulars of the crime with which they are charged. Certainly, the defendants should be furnished with this information.

The defendants have no means of knowing exactly what each individual actor may have said or done at the two performances of this play. A theatrical performance

is not fixed, definite and permanent. It is flux. Changes, additions, interpolations are made nightly. Actors will interpolate lines, postures, movements and actions never intended by the author or producer. They are what is known as "ad lib.". Those are beyond the control of author, director and producer.

Even if the defendants did have knowledge of the matters to be relied on by the prosecution, which is not the fact, still they would be entitled to a bill of particulars as to those matters, in view of the general charge contained in the indictment.

In Dunn v. Dunn, 108 App. Div. 308, Judge Ingraham said, at p. 309:

> "Assuming that the defendant has knowledge of the transactions between himself and the plaintiff's testator, that fact would not be an answer to the defendant's demand for a bill of particulars, for when there is a general allegation in the complaint of money loaned, a bill of particulars should be required to specify the particularities of the claim so that the plaintiff will be limited upon the trial and to prevent surprise. It is apparent that from such a general allegation as is contained in this complaint, the defendant would not be informed of the specific character of the plaintiff's demand so as to be prepared to meet it at the trial."

The prosecution, hiding behind the alleged cloak of public policy, seeks to deprive these defendants of their constitutional right to know the exact nature of the crime for which they have been indicted, but it must be remembered that although it may be held that an indictment is sufficient which merely avers that the alleged indecent matter is too obscene to be spread upon the records of the court, nevertheless the accused is still entitled to know exactly what the

charges are against him,and if he cannot learn this from the indictment he can be protected only by the granting of a bill of particulars. This

In People v. Moskowitz, 196 N. Y. Supp. 634, the court ordered the District Attorney to serve a bill of particulars upon the defendants.

The court pointed out that in numerous criminal cases bills of particulars had been ordered.

Judge McLaughlin said at p. 636:

> "Even in criminal cases the instances in which the courts have, by analogy to the practice in civil cases, ordered bills of particulars are frequent, viz: On an indictment for being a common barrator, where a general form of pleading is allowed. Hawkins P. C. bk. 1, c. 83, § 13; Goddard v. Smith, 6 Mod. 261; Commonwealth v. Davis, 11 Pick. 432. On an indictment for nuisance the prosecutor has been required to specify particulars of the separate acts of nuisance which he intended to prove. Rex v. Curwood, 3 Adol. & El. 815; Regina v. Flower, 3 Jur. 558."

In that case the District Attorney failed to supply the bill of particulars and the indictment was quashed for such failure, in People v. Gaydica, 203 N. Y. Supp. 243, where the court said at p. 254:

> "Bills of particulars of the sections of the Building Code or other statutes or ordinances alleged to have been violated, and stating also the <u>particular acts of the defendants</u> alleged to have been contrary to the law, and acts alleged to have been committed by them which caused or contributed to the deaths of the persons mentioned in said indictments, were heretofore ordered by this court, but the district attorney has failed to comply and refuses to comply therewith. That in itself should dispose of these indictments. The defendants are entitled to be advised of the crimes with which they are charged and by a plain and concise statement of the acts constituting the crime. The indictments do not contain such a plain and concise statement, and do not set forth facts constituting a crime,in that they charge violations of the laws of the state of New York,

the Building Code of the city of New York, and the ordinances of the city of New York, one of many crimes we cannot tell."

If the District Attorney has evidence of any further particulars than those already submitted to the defendants, he should be compelled to give the defendants a bill of particulars covering such matters,and in the event that such a bill of particulars is not given, the District Attorney should be precluded from giving any evidence of matters not contained in the bill of particulars furnished.

This very right of the defendant was pointed out in People v. Kaufman, 14 App. Div. 305, where the court said at p. 308:

"If anything more is requisite for the protection of the defendant's rights it may well be left to the discretion of the court to compel the public prosecutor to furnish such further information or specification as may be needful."

The District Attorney should be ordered to file particulars of such matters as he intends to rely upon at the trial, which have not already been furnished in the previous bill of particulars.

Respectfully submitted,

NATHAN BURKAN
Attorney for Defendants
other than Davenport.

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New York City

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New York City

Esq .,

PEOPLE OF THE STATE OF NEW YORK

-against-

MAE WEST, et als,

Defendants.

MEMORANDUM ON MOTION FOR FURTHER BILL OF PARTICULARS

NATHAN BURKAN

Attorney for Defts. other than Davenport.

(Office and Post Office Address)

1451 BROADWAY

Borough of Manhattan *New York City*

To *Esq .,*

Attorney for

Service of a copy of the within

is hereby admitted.

Dated, N. Y., *19*

Attorney for

OF NEW YORK. } ss.:
OF

, being sworn deposes and says that he is
the attorney for the above named
herein. That on the day of 19 he served the within

the attorney for the above named
ing a true copy of the same securely enclosed in a post-paid wrapper in the Post-Office—a
Post-Office Box regularly maintained by the United States Government at
in said County of directed to said attorney for the

at No. N. Y., that being the
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the place where h then kept an office, between
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SUPREME COURT:

NEW YORK COUNTY.

: :

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

against

MAE WEST, CARL REED, CHARLES EDWARD DAVENPORT, STAN STANLEY, ALAN BROOKS, JAY HOLLY, WILLIAM AUGUSTIN, CAMILIA CAMPBELL, EDGAR BARRIER, ELAINE IVANS, LEO HOWE, LESTER SHEEHAN, MARTHA VAUGHN, EDWARD HEARN, WILLIAM SELIG HERMAN LENZEN, JULIE CHILDREY, MARGARET BRAGAW, ANNA KELLER, JAMES RICH, FRANK LESLIE, WILLIAM CAVANAGH, CHARLES ORDWAY, CHUCK CONNORS the Second, FRED DICKENS, HARRY ARMAND, SYLVAN REPETTI, GENE DREW, ALBERT DORANDO, LEW LORRAINE, JO HUDDLESTON, WALTER MacDONALD, GENE PEARSON, HOWARD CHANDLER, JAMES AYERS, AUGUSTA BOYLSTON, MARGUERITE LEO, KATE JULIANNE, MAY DAVIS, EDWARD ROSEMAN, JOE DELANEY, ROBERT COOKSEY, ROBERT DeMARCHE, JAMES CLARK, GEORGE CARTIER, PHILIP KIRSCHEN, PHILIP GROSSMAN, RICHARD READ, FRED CARLTON, BARRY BONER, RUDOLPH CORNILLO, TOMMY DENTON, FRANK RINDHAGE, FRANK SPENSER, KUNI HARA, WALLY JAMES and TOD LEWIS, :

Defendants.

: :

S I R:

PLEASE TAKE NOTICE, that upon the annexed affidavits of MAE WEST and the exhibits thereto attached, verified November 5, 1928, and of STAN STANLEY, verified November 5, 1928, the undersigned, representing all of the defendants herein, except the defendant Davenport, will move this court onbehalf of the said defendants, except the defendant Davenport, at a Special Term, Part I thereof, to be held at the County Court House, in the Borough of Manhattan, City

of New York, on the 15th day of November, 1928, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order removing the indictment herein and the trial of this criminal action from the Court of General Sessions of New York County to the Supreme Court of the State of New York, and to a county other than the County of New York, and for trial at a term of the Supreme Court held in such other county as may be designated by this court, on the ground that a fair and impartial trial cannot be had in the county and city where said indictment is pending; and for such other and further relief as to this court may seem just and proper.

This motion is made under Chapter VIII of the Code of Criminal Procedure, and particularly, under Sections 344 and 346 thereof.

Dated, New York, November 5, 1928.

Yours, etc.,

NATHAN BURKAN,
Attorney for all of the
defendants other than the
defendant Davenport,
Office & P. O. Address,
1451 Broadway,
Borough of Manhattan,
New York City.

To:

Honorable JOAB H. BANTON,
District Attorney of New
York County.

SUPREME COURT : NEW YORK COUNTY.

* *

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

against

MAE WEST, CARL REED, CHARLES EDWARD DAVENPORT, STAN STANLEY, ALAN BROOKS, JAY HOLLY, WILLIAM AUGUSTIN, CAMILLA CAMPBELL, EDGAR BARRIER, ELAINE IVANS, LEO HOWE, LESTER SHEEHAN, MARTHA VAUGHN, EDWARD HEARN, WILLIAM SELIG, HERMAN LENZEN, JULIE CHILDREY, MARGARET BRAGAW, ANNA KELLER, JAMES RICH, FRANK LESLIE, WILLIAM CAVANAGH, CHARLES ORDWAY, CHUCK CONNERS the Second, FRED DICKENS, HARRY ARMAND, SYLVAN REPETTI, GENE DREW, ALBERT DORANDO, LEW LORRAINE, JO HUDDLESTON, WALTER MacDONALD, GENE PEARSON, HOWARD CHANDLER, JAMES AYERS, AUGUSTA BOYLSTON, MARGUERITE LEO, KATE JULIANNE, MAY DAVIS, EDWARD ROSEMAN, JOE DELANEY, ROBERT COOKSEY, ROBERT DeMARCHE, JAMES CLARK, GEORGE CARTIER, PHILIP KIRSCHEN, PHILIP GROSSMAN, RICHARD READ, FRED CARLTON, BARRY BONER, RUDOLPH CORMILLO, TOMMY DENTON, FRANK RINDHAGE, FRANK SPENSER, KUNI HARA, WALLY JAMES and TOD LEWIS,

Defendants.

* *

STATE OF NEW YORK
CITY OF NEW YORK SS:
COUNTY OF NEW YORK.

MAE WEST, being duly sworn, deposes and says:

I am one of the defendants named in the superseding indictment herein which was handed down by the October 1928 Grand Jury of New York County in the Court of General Sessions of the County of New York, as I am informed and believe, on or about October 5, 1928. There are fifty-seven defendants named in the superseding indictment (hereinafter referred to as the indictment), a copy of which is hereto annexed and made a part of this affidavit.

I am making this motion for a change of venue on the ground that I cannot obtain a fair and impartial trial in this county or in any other county within the City of New York.

For the purpose of preventing a multiplicity of applications, duplicating motion papers, and for lessening the labors of the court, and for brevity and convenience, this application is made on my behalf as well as on behalf of all the other defendants in this case, with the exception of Charles W. Davenport, who, I understand, is represented by his own counsel. All the other defendants, with the exception of Charles W. Davenport, join with me in this application, and the court is respectfully requested to consider this application not only in my behalf, but in behalf of each and every of such defendants.

The indictment alleges three counts which, briefly, are as follows:

> FIRST COUNT: The defendants are accused of the crime of unlawfully, preparing, giving, directing, presenting and participating in an obscene, indecent, immoral and impure drama, play, exhibition, show and entertainment, and of unlawfully aiding and abetting such acts.
>
> SECOND COUNT: The defendants are accused of unlawfully preparing, advertising, giving, directing, presenting and participating in an immoral play and exhibition, and certain scenes and parts thereof dealing with sex degeneracy and sex perversion, and of aiding and abetting in such acts.
>
> THIRD COUNT: The defendants are accused of maintaining a public nuisance.

The First Count is alleged to be a violation of Section 1140a of the Penal Law and particularly of subdivision 1 of that section (more particularly known as The Wales Act). That subdivision of Section 1140a reads as

follows:

"1. Any person who as owner, manager, producer, director, actor or agent or in any other capacity, prepares, advertises, gives, directs, presetns or participates in, any obscene, indecent, immoral or impure drama, play, exhibition, show or entertainment, or any obscene, indecent, immoral, impure scene, tableau, incident, part or portion of any drama, play, exhibition, show or entertainment, which would tend to the corruption of the morals of youth or others; or who,"

The Second Count of the Indictment is based upon subdivision 2 of Section 1140a, which subdivision reads as follows:

"2. Prepares, advertises, gives, directs, presents or participates in, any drama, play, exhibition, show, entertainment, scene, or tableau depicting or dealing with, the subject of sex degeneracy, or sex perversion;"

"3. Every person aiding or abetting any such act, and every owner, lessee, or manager of any theatre, garden building, room, place or structure, who leases or lets the same or permits the same to be used for the purposes of any such drama, play, exhibition, show or entertainment, or any such scene, tableau, incident, part or portion of any drama, play, exhibition, show or entertainment, knowingly, or who assents to the use of the same for any such purposes; shall be guilty of a misdemeanor.

"In any case of a conviction for a violation of this section, where the violation occurred upon premises licensed for any public exhibition, drama, play, show or entertainment, the licensing authority shall have power to revoke such license upon proof of such conviction; and upon such revocation such licensing authority shall have power to refuse a new license affecting such premises for a period not exceeding one year from the date of such revocation."

The Third Count of the Indictment is based upon Section 1532 of the Penal Law, which section reads as follows:

"Maintaining Nuisance.

"A person who commits or maintains a public nuisance, the punishment for which is not specially prescribed, or who wilfully omits or refuses to perform any legal duty relating to the removal of such a public nuisance, is guilty of a misdemeanor."

I reside at the Hotel Harding, 203 West 54th Street, New York City. 53

I am an actress and playwright by profession and am a member in good standing of the Actors' Equity Association, an association comprised exclusively of players and performers devoted to the legitimate stage.

In its membership are the most respectable, distinguished and eminent men and women in the theatrical profession. It enrolls such outstanding figures as Ethel Barrymore, John Barrymore, Lionel Barrymore, George Arliss, and others too numerous to mention.

Each and every of the defendants named in the indictment, with the exception of Reed and Davenport, are members of the Actors' Equity Association, and as far as I know are in goodstanding in such association and are of good moral character.

I am a legitimate actress and have played the principal parts in well known successes and I am now appearing in a play entitled "Diamond Lil".

I have been indicted because it is claimed that I wrote the play entitled "Pleasure Man", which was produced by the defendant, Carl Reed, and directed by the defendant, Charles Edward Davenport.

The defendants herein, with the exception of Reed, Davenport and myself, were salaried actors in the play, performing the parts assigned to them, and a list of their salaries is hereto attached and made part hereof, and marked Exhibit 2. None of these actors had any proprietary interest of any kind in the play and their sole connection was that of players in the play.

My sole interest in the play was that of authoress, receiving a royalty from its performances. Such is the usual, ordinary and customary arrangement between authors of plays and producers.

The play was rehearsed and staged by Charles E. Davenport, who acted as stage director of this play, but who left the company and had no more to do with it since prior to its first performance, which took place at the Bronx Opera House, County of the Bronx, on the 17th day of September, 1926.

The producer and manager of the play was Carl Reed.

The story of the play is built around backstage life of vaudeville troupes, their loves, jealousies, perplexities and so on. It is rife with "wisecracks", jokes and humorous incidents.

The role of the leading man, played by the defendant, Alan Brooks, is that of a rake, a sheik of the old school type.

The play had three acts. The scene of the first act is laid backstage in a vaudeville theatre in a small town, during rehearsal.

The second act is laid in the dressing rooms and corridors backstage.

The third act takes place in the home of an ex-performer in the same town.

In the second act the actors in the play are seen going from their dressing rooms to the stage to give their respective acts and they are likewise returning from their acts back to their dressing rooms.

The story of the play is as follows:

The locale of the play is a small town in the middle-west.

The play opens with a scene in a vaudeville theatre of the town, showing the bare stage with scrubwomen who have just cleaned the dressing rooms. Stage hands are shown moving trunks and scenery. The manager of the theatre comes on, ready to look over the new acts that were billed for the current week. The house musicians are shown ready to rehearse the music for the new acts.

Various acts come on for rehearsal. The first act is a man and wife act - Biggy Pitt Morton and wife. The second act is the Bird of Paradise, a female impersonator with his four manikins, also female impersonators. Another act - Dolo res and Randell, who are husband and wife, with four girls; this is a dancing act. Another act, Nothingwater and wife. The headliner is Rodney Terrell. He takes the star part in the play and is designated as "The Pleasure Man". There is also an acrobatic team.

"The Pleasure Man" is shown as a pronounced voluptuary; he seeks many adventures with the fair sex and seems to have a craze for women, his complex being to have them fall desperately in love with him. He has charm and personality and exercises them constantly, seeking an intrigue with almost every woman he meets. Not only does he seek the women of his own profession, but those in the towns in which he plays, as well.

The first act of the play shows Terrell carrying on various flirtations with the feminine members on the vaudeville bill.

He is particularly interested in Dolores of the team of Dolores and Randell. Randell, her husband, senses the incipient affair and admonishes his wife not to have anything to do with "The Pleasure Man".

The manager of the theatre, who also knows Terrell's reputation (Terrell having played in this theatre on a prior occasion) warns the various girls on the bill to beware of the blandishments of this modern Don Juan.

The stage manager, Sten Stanley, who was at one time an acrobat, fills in a gap in the acrobatic act and helps out and various comic lines are interpolated in that way. Having had no conquests of his own, Stanley secretly admires "The Pleasure Man" for his ability to charm the fair sex, and makes strenuous efforts to imitate him.

The end of the first act closes with the curtain coming down on the stage, showing the vaudeville bill about to commence.

The second act is set backstage, four dressing rooms being shown.

The star dressing room is being shared by Terrell, the headliner and the acrobats, including Stanley.

The next dressing room is occupied by Dolores and Randell.

The dressing room above Terrell's is used by The Bird of Paradise and the four manikins; all female impersonators.

In the next room are the girls of the Dolores and Randell act, four dancing girls.

The actors are seen in the various dressing rooms, making up for the performance.

The girls in the upper dressing room are discussing the affair that is going on between Dolores and Terrell.

The female impersonators are seen disrobing.

Music is heard off-stage, as the different actors close their acts and the applause of the audience is heard.

The actors are seen coming back from the stage and other actors are shown going on to their acts.

A knock is heard at Terrell's door and he is told that a lady wishes to see him. He goes out and meets one Mary Ann, a young woman who lives in the town. She tells him that he has gotten her into trouble and asks him to keep his promise to her and marry her. Terrell spurns her. She pleads with him. Just then, the signal is given for him to go on with his act, and he throws the girl against the wall and she falls to the floor in a faint. He leaves her there and goes on to the stage.

The other artists, hearing the commotion, rush out of their dressing rooms and find the girl on the floor.

It seems that an electrician, Ted Arnold, who is working in the theatre, is the brother of Mary Ann, and that he has recognized his sister's picture on Terrell's dressing table.

The brother has also heard the commotion and rushes in to find his sister lying on the floor. He picks her up and carries her into the rest room.

Terrell returns from his act.

A vaudevillian, named Lester Queen, enters. He knows almost all of the actors personally and invites them all to a party that night to be given by one Toto, who is a wealthy resident of the town and was a former vaudevillian who presented a canine act. Most of the artists agree to be at the party that night. Lester tells them that as the cars will be waiting for them after the show, they need not bother taking off their make-up; as the party will be a costume party.

The Bird of Paradise, the female impersonator, who had seen Terrell throw the girl to the floor, threatens to expose him.

Randell has gone out. His wife, Dolores, is alone in her dressing room; Terrell enters her room and a tender love scene ensues between Terrell and Dolores. Randell re-enters the room and finds his wife in Terrell's arms. There is a fight between the two men. The struggle is carried on from the dressing room to the corridor. Stage hands and others intervene and separate the men, and Randell screams at Terrell, "I'll get you, yet, you dirty rat. Go damn you." Whereupon, the curtain falls.

The curtain for the third act rises upon Toto's home, where the party is in full swing. The female impersonators, in costume, are present. Various invited guests, residents of the town, are present, wearing evening clothes. Terrell, Dolores, the acrobats, Stanley, the stage manager, and other members of the bill, mingle with the guests. There is music and dancing. The various acts do their specialties for the entertainment of the other guests; the entertainment consisting of songs and dances such as are usually seen in high class vaudeville shows.

During the height of the merriment, Randell enters, very much intoxicated, looking for his wife, Dolores. He had learned that she had gone to the party with Terrell. Terrell and Dolores, having heard Randell come in, dance off into an anteroom, and the various artists, in order to avoid a scene, try to persuade Randell that his wife is not at the party. He exits, threatening that he will kill Terrell when he finds him.

The party immediately breaks up.

After the guests leave, Terrell and Dolores return from the anteroom. Terrell has now become intoxicated and reckless. He tries to persuade Dolores to spend the night with him at this house, telling her that everything has been arranged; that he has a room upstairs. She refuses and runs away from him, but as she leaves him, he says: "I'll expect you back!"

Terrell takes a few more drinks and finally staggers to a room upstairs.

Toto comes in and tells his butler to turn the lights out and retire. The butler turns out the lights and is about to retire. As he does so, a slam is heard upstairs, as if someone had gone out of Terrell's room. The butler exits. The stage is dark. Dolores is seen returning. She ascends the stairs to Terrell's room.

A second or two later, a terrific scream is heard from Dolores, who comes down the stairs greatly agitated. The scream also brings Toto down stairs. Toto rushes over to Dolores and asks her what has happened. She points up

to the stairs and cries "Terrell". Toto runs upstairs.

Dolores staggers over to the couch, thoroughly exhausted. Toto comes running back to her and she says: "Toto, for God's sake, do something, quick!" Toto rushes to the telephone, clicking the receiver madly. He asks for the police station. Dolores tries to prevent his calling the police, but Toto gets the police station on the wire and shouts "Come at once; something terrible has happened." The curtain falls slowly on this scene, while Toto says, "I can't explain over the telephone".

The curtain is lowered for a minute, indicating a lapse of two hours.

The curtain rises on the same scene. The Chief of Police is sitting at the table, questioning Toto, the various members of the household, as well as the members of the vaudeville show who had been at the party, including Stanley, the stage manager, Randell, Dolores, the manager of the theatre and The Bird of Paradise.

In the course of the questioning, it is brought out that Terrell had been killed.

Suspicion is fastened upon Randell, because he had been heard to threaten Terrell. Randell is placed under arrest and is about to be taken away, when a detective walks in with Ted Arnold, the electrician and brother of Mary Ann. Ted confesses that he killed Terrell.

The theme and plot of the play are clean and decent.

The play is not obscene, indecent, immoral or impure, nor does such play contain any obscene, indecent, immoral, impure scene, tableau, incident, part or portion, which would tend to the corruption of the morals of youth or others, nor does the play or any scene or tableau thereof depict or deal with the subject of sex degeneracy or sex perversion, nor was such play or any part thereof a public nuisance.

The premier or the very first performance of the play took place at the Bronx Opera House in the Borough of the Bronx, City of New York, on the 17th day of September, 1928, and said play was continuously performed every night thereafter during that entire week and on the Wednesday and Sat-

urday matinee of that week.

I am informed and verily believe, that the Honorable William J. McGeehan, District Attorney for Bronx County, attended the performance of such play for the purpose of ascertaining whether or not such play violated the Penal Law or any part thereof.

The performance which Mr. McGeehan witnessed was identically the same performance which was given in New York County, for which we were indicted.

Mr. McGeehan directed the elimination of a song, which song was eliminated, and the play was permitted to be performed in such Opera House in Bronx County for eight continuous performances without molestation, arrest or interference of any name, nature or character.

Upon the conclusion of the engagement at that Opera House, the attraction was booked for the week commencing September 24, 1928, at the Boulevard Theatre, Jackson Heights, Queens County. Such attraction was performed identically the same way as the performance for which we were indicted and was presented publicly for eight performances during such week; that is, during each night and on the Wednesday and Saturday matinee of that week, without molestation, interference or arrest of any kind.

There was no criticism of or objection to this play during such presentations covering a period of two weeks from any source whatsoever. Public officialdom, the press, the laity and clerics were as silent as the tomb with respect thereto.

On or about the 29th day of August, 1928, the defendant Reed entered into a booking contract with the Chanin Theatre Corporation, the booking contract with the Chanin Theatre Corporation, the booking agent of the Biltmore Theatre, located at 267 West 47th Street, in the Borough of Manhattan, City of New York, for the presentation of this play at such

The booking contract is in the usual form. Under this booking agreement, the owner agreed to furnish the Biltmore Theatre with a stage crew, ushers, ticket sellers, doorkeepers, coupon and regular house tickets, house programs, regular house license, and the theatre's usual crew to assist in handling the scenery and baggage of the attraction. The owner agreed to place and pay for advertising of all kinds and description up to the gross cost of $200.00 weekly, and agreed to share with the producer the expenses of all additional advertising.

The box office and the theatre, under this license, remained in the possession and control of the owner of the house, the producer simply having a license to bring in his scenery and his cast of players and to participate in the receipts from the performances. The division of the receipts was 50% of the gross receipts to Reed and 50% to the owner on the first $5,000.00 of receipts, and 60% to Reed and 40% to the owner on the excess.

The said play was advertised for the first public performance at said Biltmore Theatre in the County of New York on the evening of October 1, 1928.

Without any notice or previous warning to the management, the Police Authorities planned to stage a sensational and spectacular raid upon this play. The newspapers were "tipped off" - given ample notice of the contemplated foray.

Accordingly, early in the evening a squad of police entered the theatre and took stations at various place's in the theatre during the early part of the evening, and practically took possession of the stage.

At a little after ten o'clock, they informed the players that at the conclusion of the performance all hands would be taken to the police station.

I was not a performer in this play. I was then and still am appearing in a play called "Diamond Lil", at the Royale Theatre, on West 45th Street, New York City.

Accordingly, at the conclusion of the performance, the players were all taken into custody. The arrest was spectacular; the press of the City was well represented and on the scene with all its paraphernalia for the manufacture of news - the camera and the flashlight. They were used to graphically and vividly record the event for subsequent reproduction in the press.

On the following day, October 3, 1928, all the defendants, with the exception of Davenport and Reed, were arraigned before Magistrate Weil, at the Seventh District Police Magistrate's Court, on West 54th Street, Borough of Manhattan, City of New York.

The defendants were represented by Nathan Burkan, Esq., as their counsel, and were ready to proceed with a hearing.

Mr. Burkan, my counsel, stated to the Magistrate that he had just returned from Rochester; that he had not seen the play; that upon Honorable Joab H. Banton's return to the City, on the following day, he proposed to deliver to him a manuscript of the play, and that the management would make such deletions as Judge Banton suggested or required, and that if in Judge Banton's judgment, the play

play should be taken off the boards, the play would, with out further ado, be withdrawn from public presentation.

Inspector Boland, in charge of the case for the police, requested two days' postponement of the hearing, because of the absence from the City of the Honorable James G. Wallace, an Assistant District Attorney, to whom was to be assigned the prosecution of this case.

Thereupon, Mr. Burkan, in the presence of the Magistrate, inquired whether, during the interim, there would be any further arrests of the players. The Inspector stated that he could make no promise as that was entirely up to the Police Commissioner and that Mr. Burkan would have to communicate with the Police Commissioner and ascertain from him what his intentions were regarding any further performances of the play.

Mr. Burkan attempted to reach the Commissioner of Police from the Police Court, without success. He renewed his efforts on four different occasions, but each time the response was that the Commissioner was out.

As is usual and customary for presentation of plays on the New York City stage, there was an advance sale of seats to the public.

The hour for the opening of the performance was rapidly approaching. The Police Commissioner could not be located, and accordingly, to protect the public from the inconvenience, embarrassment and annoyance of a spectacular police raid and to prevent the morale of the players from being destroyed, the usual application for a temporary injunction was made in this court to restrain the Commissioner of Police, the

District Attorney, the Mayor of the City of New York and the License Commissioner, from making any further arrests or doing anything to interfere with the performances of the play, until this court would pass upon the alleged obscenity of the play. 63

I applied for a restraining order before Mr. Justice Valente and the same was granted on October 2, 1928 to endure until the morning of the 5th of October, 1928, and a performance of the play was given that evening.

At about ten o'clock on the following morning, October 3, 1928, my counsel, Mr. Burkan, telephoned Judge Banton and stated to him that he would send him the manuscript of the play for his scrutiny; that such changes would be made therein as he suggested or directed, and that if, in his judgment, the play should not be produced, no issue would be taken with him upon that score, but the play would be immediately withdrawn from the boards. Judge Banton replied that it was the policy of his office not to act in the capacity of a censor; that he would not censor any play; that if a crime was committed, it was his duty to prosecute the crime; whereupon, Mr. Burkan replied that it was not the intention of his clients to multiply crimes or do anything objectionable or offensive to him, as the prosecuting attorney for the County; that his action would not be deemed that of a censor. Accordingly, after some persuasion, Judge Banton stated that he would that night send to the theatre, Mr. Albert Unger, one of his assistants, and Mr. John Donlan, his secretary, for the purpose of viewing the play, and Mr. Burkan was to meet them at the playhouse and whatever recommendations Messrs. Unger and Donlan made with respect to the play

would be followed out to the letter, without further litigation or question. Accordingly, four seats were laid aside that night subject to the call of Mr. Unger. (4

On the afternoon of that day, October 3, 1928, as I am informed and verily believe, Mr. Wallace, Assistant District Attorney, without notice to Mr. Burkan, applied to the Appellate Division, First Department, for an order vacating the stay granted by Mr. Justice Valente. The application was granted and the stay was vacated. In granting the application, the Appellate Division wrote a Per Curiam opinion, as follows:

> "The within order, insofar as it grants any temporary injunction, is vacated, annulled and set aside as an abuse of discretion. The rules governing the granting of injunctions against police officials and the reason for not issuing same, except in extraordinary cases, have been clearly and forcibly set forth by the late presiding Justice Kelly, in his opinion in Kalwyn Business Men's Association, Inc. v. McLaughlin, 216 App. Div. 6 (1926). Order filed."

On October 3, 1928, immediately after the Appellate Division had vacated the stay, the police appeared at the matinee (Wednesday afternoon) performance of the play. The police went on the stage and in a dramatic fashion ordered down the curtain, dismissed the audience, and the players in make-up, garb and costume of their roles were hustled into patrol wagons and taken to the police station. The theatre was overrun by newspaper reporters, camera men, space writers, etc. Pictures were taken of the raid, and the various incidents and episodes connected therewith and subsequently reproduced in the press.

On or about the 3rd day of October, 1928, the defendants, through their counsel, Nathan Burkan, were informed

that the hearing before the Police Magistrate was to be abandoned, and the matter would be submitted to the Grand Jury for indictment. Accordingly, the matter was submitted to the Grand Jury, and an indictment was found against the players, including the defendants Davenport, Reed and myself, on the 4th day of October, 1928.

This indictment was found without a preliminary examination or hearing in the Magistrate's Court.

The indictment fails to state the alleged obscene, indecent, immoral or impure matter which these defendants are chargedwith presenting, and likewise the indictment does not state the words, acts or substance of the alleged sex degeneracy or sex perversion with which the said play is alleged to deal. The indictment merely gives the pleaders' conclusion therefrom in the form of most glittering generalities, and it excuses a statement of the alleged obscene, indecent, immoral and impure matter, and the matter alleged to constitute a treatment of sex degeneracy and of sex perversion, by averring that the play would be offensive to the court and improper to be spread upon the records thereof.

In view of the fact that the indictment against these defendants was handed down without any preliminary examination or hearing before a magistrate, and the indictment lacking specification of the matter alleged to be criminal, the defendants, in order to prepare for trial, deemed it necessary to make a motion to inspect the minutes of the Grand Jury. Such motion was made on or about October 12, 1928, and was thereafter argued before and submitted to Honorable Morris A. Koenig, Judge of the General Sessions, at Part I thereof. No decision has as yet been rendered by Judge Koenig on said motion.

Stripped of all camouflage, the basis for this prosecution is the personality of the male players who impersonate female roles. 66

The court will take judicial notice of the fact that female impersonation has been an integral part of stage characterization ever since the birth of the drama. The greatest roles in the Shakespearian plays are the female roles, and all such roles were for years portrayed by male actors. Most violent love scenes, dancing scenes, etc., were enacted by such impersonations.

In our own day, so-called Varsity Shows - plays enacted by college students in college towns - utilize boys to enact female parts. In such Varsity Shows are represented upon the stage, love scenes, dances and other scenes, incidents, episodes, situations and business executed by males in conjunction with other males dressed and made up as females.

The famous Lambs Gambol given in the City of New York during the past quarter of a century, in the Metropolitan Opera House, and in other theatres, invariably have the female roles represented by male actors in the garb, dress and make-up of females.

Upon our vaudeville and legitimate stages appear eminent and well-known male players whose speciality is female impersonation.

The most celebrated of such female impersonators is Julian Eltinge, who appeared in many successful plays, playing the role of a female in the dress, make-up and garb of a female. In such plays he was engaged in love scenes with a male, dancing with a male, and in such situations as the manuscript called for.

The famous team of Savoy & Brennan toured the country for many years, Savoy impersonating a female. After his death, several years ago, his partner continued the act with Stanley Rogers, under the name of Brennan & Rogers.

Olyn Landick is one of the famous female impersonators appearing in the best vaudeville houses throughout the country and receiving a very substantial salary. He dresses in the garb of a woman, sings like a woman and completely mystifies the audience at each performance.

Karyl Norman plays in the best vaudeville houses in the country and is frequently a headliner. He also impersonates a woman.

Lionel "Mike" Ames is one of the better known female impersonators who receives a very substantial salary and who has been very successful for a number of years, appearing in the best theatres in the country.

The Seven Collegians is the name of a vaudeville troupe which appears in first-class vaudeville theatres, all of the feminine roles being played by men dressed as women, and these impersonators sing and dance just like women.

Other well-known impersonators who have been very successful and who receive substantial salaries and who are known throughout the country are Lestre LaMonte, who plays in a fashion show in which elaborate gowns are used; Mingle Del Ortos, who specializes in Spanish dancing, ballet and tango, and who also sings; Francis Renault, who wears the most elaborate gowns and plays a fashion show. In addition thereto, Renault gives various character impersonations of women. There is also Effingham Pinto, a female impersonator, who is very clever in character parts.

These are but a few of the many female impersonators who have become successful on the American stage, as well as abroad, and who receive large salaries and play at the leading theatres in New York City and throughout the country. There is scarcely a week that one or another of these female impersonators is not seen on the stage in New York City.

Grouping a number of female impersonators upon the stage in a play, and having them perform their acts of impersonations, is not sex degeneracy or sex perversion under the laws of this State.

The alleged grouping of a number of female impersonators upon the stage at one time and the performance of their acts of impersonation are the real crime charged.

I have been at some pains to show the flimsy nature of the indictment and the methods employed by the police in order that the court may realize the great injustice of this prosecution and the difficulties under which these defendants are laboring in their attempt to obtain a fair and impartial trial.

The repeated arrests of the defendants and the spectacular manner of these arrests and particularly the indictment of the defendants without a preliminary hearing, created a great furore and the press took up the hue and cry in a most vigorous manner.

Although no script of the play was in the possession of the District Attorney, and although no script of the play had been shown to the Magistrate or to the Appellate Division, the newspapers jumped to the conclusion that the play was obscene and lewd. The press apparently took it for granted from the ex parte decision of the Appellate Division, that

was launched, with "The Pleasure Man" as the horrible example.

It is to be noted, however, that not a single play running on the New York City stage was closed, no arrests were made, no indictments found, but all the plays, the players and managers, then current in the City, kept going without molestation, annoyance or interference. The whole campaign against unclean plays was a pretext and camouflage to justify the continued newspaper pounding against "The Pleasure Man" and these defendants.

Assistant District Attorney Wallace, on the argument of the motion before Judge Koenig, stated in open court that all the newspapers had carried a story to the effect that this play went so far South as had not yet been gone before in obscenity.

Prompted by the statement to the newspapers credited to Inspector Boland that "The Pleasure Man" was one of the rawest he had listened to in years, the Evening Journal of October 3, 1928, published an article running across the entire page entitled "RAWEST SHOW - BY FLAMING MAMIE Rep to Come".

The Evening World of October 2, 1928, said:

"Of the play itself, produced by Carl Reed, looked at from the critical eye of a reviewer, little can be said except that it probably the most vulgar and the most stupid New York has seen in many a day. * * *

"Inspector Bolan was quoted by subordinates as expressing the opinion that the play was one of 'the rawest he had listened to in years'.

"The big scene is staged as an entertainment in which no fewer than twenty-seven men dressed in women's attire take part. Their conversation is not uplifting."

The Evening World of October 3, 1928, stated:

"The arrests on Monday were made by order of Mayor Walker, who is said to have instructed Police Commissioner Warren to arrest everybody connected with the play if it was found to be as objectionable as it had been reported to him by persons who saw trial performances in the Bronx and Queens. He gave his instructions before leaving Sunday for Washington."

The World of October 3, 1928, carried an editorial reading in part as follows:

"In view of the reputation that had preceded 'Pleasure Man', the new play by Mae West which opened Monday night, the police were certainly justified in placing it under surveillance and, if they found evidence that the law was being violated, in placing those responsible under arrest."

The World in its issue of October 3, 1928, in an article said:

"The background for this action is the sexual abnormality of a large number of female impersonators, who are part of the vaudeville performance. Very little is left unsaid. The lines are of the sort that would seem coarse in a burlesque show.

"The final act shows a wild party in the house of one of these abnormal men.

"The audience, at first inclined to shout hilariously at the more suggestive lines, did not seem pleased with the exhibitions of female impersonaton which were part of the festivities in the

third act. Several of them were observed to spit on the sidewalk outside the theatre as they walked out."

The New York American of October 3, 1928, carried an editorial entitled

"WALKER ORDERS CLEAN UP OF STAGE"

in letters one inch high across the page. A copy of the editorial in full is annexed hereto and made a part of this affidavit.

The New York American of October 3, 1928, in its article concerning the play, stated:

"Mayor Walker is determined further to prevent the exhibition of nearly-nude women on the stage. * * * He is disposed to look on the drama liberally, but there are phases of recent productions for which he will not stand while thereis power in police force and laws on the statute books to prevent it."

The Evening Journal of October 3, 1928, printed an editorial entitled

"FILTH ON THE STAGE"

a copy of which is hereto annexed, and it carried my picture, walking out of the courtroom with the following matter underneath:

"ROTTENEST SHOW" FLAYED.

"'Outraged public opinion yesterday demanded suppression of defiant Mae West's "Pleasure Man.'"

In the same paper in the issue of the same date the following article appeared.

"PRODUCTION ROUSES PUBLIC;"

"'Mae West, blonde playwright who spent ten days in jail for appearing in "Sex," late yesterday obtained from Supreme Court Justice Louis Valente a temporary order good until Friday, restraining the police from interfering with her latest production, "Pleasure Man," which they raided Monday night on the ground that it was based chiefly on the revolting subject of sex perversion.

"The court order would permit her to repeat the play daily until Friday's arguments, although everywhere in the city and from all classes of citizens--most of all, perhaps, from members of the theatrical profession itself--there arose a united demand for immediate and permanent suppression.

"Police, however, prepared to circumvent the court by another raid on the show after the fall of the final curtain last night.

"To rearrest Miss West and other members of the cast at that time would not, it was pointed out, interfere with the performance.

-"AND TO KEEP IT UP!"

"And we'll keep it up until the show is driven out of New York," a high police official said.'"

"The play's affrontery to decency--as exemplified by the opening performance--was apparently too abysmal for even veteran police officers, who witnessed it, to describe.

"CALLED "RAWEST YET."

"Detective Lieut. William Coy, the complaining witness against Miss West and the actors in the drama, said it was "Too much" for him. "I couldn't describe the show," he declared, "without using words that I don't like to see used in print."

"Deputy Chief Inspector James Bolan, who directed the raid on the Biltmore, termed the production "the rawest ever attempted in New York."

"James Sinnott, secretary of the police de-

partment, whose special job is to keep a watchful eye on plays which invade the borderland of decency, was likewise disinclined to comment on the West opus at length.

"The action of the police," he said, "speaks for itself."

"ALL CLASSES INDIGNANT."

"Everywhere in the city and from all classes of citizens--most of all, perhaps, from reputable members of the theatrical profession itself--there arose a united demand for the immediate permanent suppression of the play.

"By far the rottenest show ever presented on Broadway," was a description generally applied to it by public officials and others who familiarized themselves with the script."

And again the same paper on October 4, 1928

carried an editorial entitled

"PERVERSION BY INJUNCTION"

a copy of which is hereto annexed.

The New York American of October 6th, 1928

carried an article entitled

"CLERGY DIVIDED ON POLICE CENSORSHIP OF THEATRE"

a copy of which is hereto annexed and made part of this affidavit.

The same paper on the same day carried an article entitled

"INDICTMENTS PILING UP IN STAGE DRIVE"

That article reads in part as follows:

"Meanwhile, information came exclusively to the New York American that the police raid Monday night on Mayor Walker's orders was not only performed without the knowledge of the District Attorney, but frustrated the District Attorney's plan to investigate the play with a view to taking similar action.

"Hitherto, in cases of police raids on plays, The District Attorney has worked hand in hand with the Police Department. In the case of "The Captive,"

"Sex" and other banned plays action was taken on theinitiative of the District Attorney, with the police assisting under the direction of the Mayor.

"For some unknown reason, however, Mayor Walker this time furnished the initiative on advice of the Corporation Counsel's office. The police raid was staged while District Attorney Banton and Assistant District Attorney Wallace, who handles the prosecution in such cases, were attending the Democratic State convention in Rochester.

"WAS TO SEE SHOW."

"Wallace admitted yesterday he had planned to visit "Pleasure Man" on his return from Rochester Wednesday night. It was learned seats had been put aside for his use for that performance. Two police raids had been staged by that time, however, and the play went out of existence the Wednesday evening performance."

The New York Sun of October 6th, 1928 carried an article reading as follows:

"MAE WEST'S TROUBLES MULTIPLY"

"Second Indictments, Returned While Cast Was in Court, May Clinch Case Against Her."

"Mae West and her "Pleasure Man" cast had a breathing spell today, after a week of hectic activity incident to the messy legal tangle precipitated by their efforts to present their latest theatrical experiment.

"Two arrests, several court appearances and two separate sets of indictments was the score checked up against them during the last five days, and most of their future prospects were very slim.

"The second indictments came from the Grand Jury yesterday while the authoress and the cast were in Judge Koenig's court attempting to arrange bail on the first. This action was regarded as considerably strengthening the case against all of them.

"Not only does it incorporate the original charge of presenting an indecent play, but makes the more precise complaint that they presented "certain parts of a play tending to corrupt public morals" and adds the additional allegation that they maintained a public nuisance. The first indictment returned on Thursday had charged them simply with indecency in presenting "a play tending to corrupt public morals."

The New York Times of October 6th, 1928 carried an editorial reading ass follows:

"A GOOD SHOW TO CLOSE"

"Those who have seen Mae West's latest play, "Pleasure Man," are virtually unanimous in its condemnation. They believe the police fully justified in arresting its cast under the section of the penal code which forbids indecent shows. Such popular support of a censorship action is almost unprecedented in these parts and will go far to convince the community that for once, at least, the police have invoked the law in its interest.

"There is room for complaint, however, against their choice of occasion, if not of method. To be sure, in both respects their present action is preferable to that taken last year against "The Drag," of which, from all accounts, "Pleasure Man" is only a slightly altered version. "The Drag" was debarred from the New York stage in advance of a showing by the simple expedient of threatening it with padlock proceedings, which automatically prevented it from obtaining a theater. Such arbitrary power, though it may have worked a benefit to society in this case, can be, and has been, invoked against worthy productions. It is far too dangerous a weapon to be intrusted to any public official or agency and should be withdrawn by repeal of the Wales law.

"But the point is that the police authorities, as a result of their experience with"The Drag," should have been forewarned of the character of "Pleasure Man" and have taken steps to bring its producers to book after its first performance in the Bronx two weeks ago. This they might have done with a minimum of publicity. Instead, they permitted the play to run unmolested not only a week in the Bronx, but another week in Queens, and did not pounce upon it until the night of its Manhattan premiere. The result has been a raid in the brightest of limelight and a country-wide advertisement of a show that in its unwholesome consequences defeats the object of the law.

"The only valid excuse for the delay is one which ascribes it to a desire to warn the stage as a whole, through the publicity of the action, against further attempts to commercialize pornography. Even so, we doubt the wisdom of such a course as compared with an enforcement of the statute that is both prompt and quiet."

The Evening Post of October 6th, 1928 writes

a special article by Robert Littell headlined

"OF THE UNPLEASANT "PLEASURE MAN," AND DIRT IN GENERAL, AND UNEMPLOYMENT AMONG ACTORS."

The writer states in the article

"The attempt of Mae West in her play "Pleasure Man" to drive three or four hundred miles beyond the frontier of decency has had its inevitable result. The police are going to investigate several other plays with an eye to finding more lines and situations which are not fit for the eyes of innocent, pure-minded New York. They can be assured, right now, that, compared with "Pleasure Man's" many and worse moments, all the other shows in New York are church sociables. We wish they would rest on their laurels and leave the other shows alone. But of course they will not. As soon as one producer or playwright crosses the border line into obviously forbidden territory, all the legitimate advance in freedom of subject and language on the stage suffers a set back. The public performance of such inexcusable nastiness as "Pleasure Man" invites all sorts of narrow-minded bigots to suspect and investigate and bowdlerize and suppress such serious or good-natured treatment of sex as has a perfect right to exist in the year 1928.

"The more serious the treatment, as the history of the stage has repeatedly proved, the more are the bigots up in arms. The bigots and the police occasionally reprimand a musical show for indecent exposure, but I have yet to hear of any raid on the raucous, slimy, double-edged lines (frequently calling forth just such laughs at the expense of perversion as were heard from the audience of "Pleasure Man") to be found in one out of every three musical comedies, no matter how otherwise respectable. There seems to be some curious tacit agreement among the bigots that musical comedy audiences can take care of themselves. Which is, of course, the sensible attitude to take in regard to any show--perhaps even "Pleasure Man."

"It was quite plain that the audience at the first performance of "Pleasure Man" was divided, I could not say in what proportion, between those who were bored and almost physically sickened, but not permanently damaged, and those whose minds were already so nasty that no further damage of any kind was possible. For this latter class prevention of dirty shows is useless. The unclean mind has unlimited power to feed on itself, and starvation in this case is not a cure.

"The one satisfaction that the authors and stagers of an outlawed performance can have is that of publicity. "Well, at any rate," one can hear them saying to themselves, "we were important enough

to make Page One." Which, in the instance of "Pleasure Man," occurred several days in succession.

"If we were really as civilized as we like to think, public nastiness beyond the accepted limits would be punished, not by howls and indignation, but by complete silence. I look forward to living in such times as will freeze out repetitions of "Pleasure Man" by ignoring them, by boycotting them with total absence of printed comment. The show was bad enough in itself, but it was much worse for being the talk and the reading matter of the town for more than a week.

"Behind the explosions of disapproval, public and private, there was a certain amount of the curiosity which is fascinated in spite of its distaste and likes to talk about it all anyhow.

"You will find that most violent public suppressions of dirt contain a certain amount of anger at our own lower selves for being interested in the dirt."

The New York American of October 6th, 1928 carries an editorial underneath a good sized cartoon, six inches by eight inches, depicting a man on a stage with a hook around his neck indicating that "Unclean Plays" are given the hook.

The editorial reads as follows:

"Every time the authorities use the legal means at their disposal and rout unclean plays from the stage of the New York theatres, the public will applaud heartily.

"The padlock provisions of the Wales Act and the anti-obscenity provisions of the general statutes of the State are ample means to protect producers of wholesome shows and to insure the public generally that filth will not be foisted before the footlights under the guise of "Art" or "Truth" or "Life as it is."

"This was impressed upon the theatre-going public and very forcibly upon the author, producer and cast of that disgusting "Pleasure Man".

"Mayor Walker, liberal of the liberals, and foremost of metropolitan theatre patrons, put down his foot firmly on footlight filth, and his vigorous stand in "giving it the hook" won him country-wide commendation. The stage CAN be and MUST be kept CLEAN."

The New York American of October 7th, 1928 carries an

article by Pierre de Rohan, a special writer,in which he states

"Once more the blood-hounds of the law are at full bay through the arc-lighted aisles of the theatre, and once more their scurrying quarry is Miss Mae West. The wave of public indignation predicted in this column several weeks ago is upon us. The drama is about to be sent to the cleaner's to have the gravy stains removed from its vest."

The Morning Telegraph of October 7th, 1928, in large headlines says

"PLEASURE MAN" SPURS DRIVE AGAINST THEATRE; TO CENSOR MORE PLAYS"

and the article reads in part as follows:

"The next to be marched to the alter for betraying the old fireside was "The Pleasure Man," Mae West's show which was raided twice at the Biltmore Theatre, after escaping Mr. Gallagher's attention in Brooklyn.

"But you have no idea !

"That's only the beginning, they do say. There are more of these shotgun weddings in store for the "Pleasure Men" of Broadway. The naughty show must go, officials say."

The same paper under the headline entitled "BROADWAY", written by Wallace Sullivan says

"To Broadway this is National Filth Week!

"There have been more putrid jokes, smutty cracks, loose quips, moronic gags, unwashed stories, sewerized epithets coined, passed, flaunted, reared and resurrected these last few days than ever before in New York.

"Every little stenographer, saleslady, counter girl--every little song writer, shoe clerk, fountain attendant--every big broker, big producer, big politician--every person almost who knows an iota about Broadway is conscious that this is a time when everybody knows all the latest perverted wit emanating from the dregs of histrionism--"Pleasure Man," by Mae West."

The New York American of October 7th, 1928 in an article entitled

"CITY WILL OPPOSE MERCY FOR MAE WEST
AND CAST"

stated in part as follows:

"Banton to protest"

"Banton declared firmly, however, he would refuse to countenance any such procedure when the case is resumed in General Sessions next Friday. He said he would insist vigorously on prosecuting every person concerned with the production. It is his opinion the actors are accessories.

"One of the most effective methods of ridding the stage of indecency, Banton feels, is to punish actors who take part in the offending plays.

"In this way he hopes to arrive at the point where actors will refuse to accept such roles. That, he feels, would be the most practical way--a sort of self-censorship within the profession.

The New York Sun of October 8th, 1928, in an article by Gilbert W. Gabriel, its reviewer, entitled THE DIRT ROAD writes as follows:

"Whatever happens to this thing of Mae West's called "Pleasure Man," it is not worth remembering of its own account. But it touched a sort of high mud mark for the present tide of playmaking: its strong smell of wretchedness and inhuman vulgarity was without excuse--but not without precedents. It is really these that warrant an examination. If I try to conduct one spare me the necessity of taking on a tone of shocked morals and innocence at bay.

"The children of Times Square have been granted a great many new lattitudes in language of recent season. Both on and off stage the tongues of men and angels have been severely coated with ever blunter and grittier allusions to man's anatomy, to the mating urge, to the maladjusted gentlemen whom the newspaper code of euphemism must go on describing as female impersonators."

On October 9, 1928 The New York Evening Journal carried an article by DeWolfe Hopper entitled

"HOPPER DISGUSTED AT DIRT ON MODERN STAGE"

and

"HOPPER FLAYS STAGE FILTH"

The New York American of October 9th, 1928 carries an editorial in large type headlined as follows:

"NOBODY LIKES THE PRINCIPLE OF CENSORSHIP, BUT
IT WILL SAVE THE STAGE AS IT DID THE MOTION PICTURES."

Underneath are three large pictures. One of Police Commissioner Joseph J. Warren, one of Mayor James J. Walker, and one of Joab B. Benton, the District Attorney.

Above the pictures is the statement

"NEW YORK OWES THESE MEN A VOTE OF THANKS."

The reference in the editorial is to the play, "The Pleasure Man." A copy of the editorial is annexed to this affidavit.

The Morning Telegraph of October 11th, 1928 carries an editorial entitled "PROTECT THE THEATRE" in which it says,

> "The after effects of "Pleasure Man," whose short life on Broadway is already known, is beginning to have its effect in a vigilant watch on other Broadway shows."

The Morning Telegraph of October 11, 1928 recounts proceedings before a meeting of the Jewish Theatrical Guild wherein Senator Abe Greenberg stated as follows:

> "The public should protest against such plays as "Pleasure Man."

The New York American of October 11, 1928 carries a story preceded by a headline in large black type

"PADLOCK THREAT FOR THEATRES"

"CITY INVOKES LAW BARRING VULGAR PLAYS"

The article reads in part as follows:

> "In a statement issued last night in the City Hall, Mayor Walker declared his intention of invoking the padlock provisions of the Wales law against theatres used for exploitation of filth.
>
> "This statement was issued simultaneously with renewal of police activities against a number of allegedly immoral plays which have opened in this city recently.

"The Mayor made it known that he has suggested to Police Commissioner Warren that in the future James P. Sinnott, secretary of the Police Department, be detailed to review all suspected shows before such shows open in New York.

"It is the Mayor's plan to have Sinnott attend performances of such shows while they are having their "tryouts" in nearby towns or cities.

"This, the Mayor said, will make it possible to give early notice to theatre owners in which immoral plays are scheduled for production that padlock proceedings will be brought against them if those shows are allowed to go on.

"The Mayor explained that under the provisions of the theatre padlocking law, no steps could be taken against the owners of the Biltmore Theatre, in which Mae West's "Pleasure Man" held forth, until wholesale arrests and indictments forced it out."

The Herald Tribune of October 2nd, 1928 in its account of the first arrest and its review of the play By Richard Watts Jr. said

"To the accompaniment of a whispering campaign that finally grew audible in its vigorous hints that the play was to receive drastic police attention, Miss Mae West's latest work, "The Pleasure Man," had its first and, conceivably, last Broadway performance at the Biltmore Theater last night. The ever-growing threat of the law's attention may have provided certain theatergoers with a vicarious interest in the proceedings, but it could hardly hide the fact that the play is the dullest, cheapest and, to be as fair as possible, nastiest theatrical exhibit you could possibly avoid in years of drama-dodging.

"A season ago, Miss West wrote a play on effeminacy called "The Drag." The Wales padlock law, among other things, kept it from a New York performance, but Miss West was but temporarily stopped. She merely added the character of a vaudeville actor, who, at least in his speed, made Casanova and Don Juan look like one-women men, added a surgical experiment, and felt that her play was ready for Broadway consumption."

The Evening Graphic of October 2nd, 1928, with a front page picture showing the arrest and showing my photograph states in large type one and one-half inches high

"MAE WEST DEFIES COPS"

Underneath is the statement

"MAE WEST NABBED AGAIN FOR SEX SHOW!"

"It was the Black Maria for blond Mae West and her coterie of actors last night, when police "pinched" the entire lot for giving an "indecent performance" at the Biltmore Theater. Name of Mae's heavy sex drama was "The Pleasure Man." She will be arraigned today in West Side Court."

The New York Telegram of October 2nd, 1928 carries my picture with an article reading in part as follows:

"Miss Mae West and the fifty-three laddies and lassies whom she might, if she were to ape Texas Guinan, advertise as "her adorable kiddies" had a great big, lovely arraignment in West Side Court today.

"There were all sorts of big cops there, and the Judge, dear old Magistrate Weil, was actually sweet. And what wonderful advertising!

"The clerk read a charge that said Mae and the rest were charged with "presenting and participating in an indecent, immoral and impure drama, containing certain scenes tending to corrupt the morals of the beholder" Namely,"Pleasure Man," which had its Broadway Premiere last night at the Biltmore Theatre."

The Evening Journal of October 2nd, 1928 had my picture twelve and one-half inches high with an article stating

"FOUR SHOWS FACING RAIDS"

"STAGE TO BE SWEPT CLEAN OF ALL FILTH, OFFICIALS ANNOUNCE"

and the following

"The Police raid last night on "Pleasure Man" and the arrest of Mae and the fifty-four members of itscase is but the first sweep of a police broom which may empty several theatres where new light is being thrown on heretofore dark places."

And the same paper on the same day had another picture of me entitled

"DIAMOND LIL SEIZED"

and the following article.

"New Play Salacious, is Charge of
Police at First Performance."

"Mae West, who served ten days on Welfare Island for producing the play "Sex," is again in trouble with the law. With fifty-four members of the case of her latest play "Pleasure Man," she was arrested early today following the opening performance of the play at the Biltmore Theatre. All are charged with taking part in an indecent performance."

"The offence is punishable by a jail term or a heavy fine or both. If the play is presented again tonight Miss West and all members of the case may again be arrested."

The Sun of October 2nd, 1928 carries another review of the play by Gilbert W. Gabriel in which he says in part as follows:

"No play in our times has had less excuse for such a sickening excess of filth. No play, I warrant, has sent out more deliberately to sell muck by the jeerful. And no play, besides that--and this is for me the unforgivable of all its sins--has ever so sagged and dripped under its flagrant load that a fairly funny fifth-rate vaude-ville show which starts it off ends up a brutal, utterly unsalted bore.

"On a night when two worthy repertory companies were beginning their seasons downtown with reminiscences of Dickens and Moliere, here was a new play by Mae West. I had never seen a play by Mae West. I hadn't seen "Sex" or "Diamond Lil". I had not traveled out to the quaint places where they acted "The Drag," the play once forbidden to enter New York alive. But so many chirrupy columnists and highbrown weeklies and fellow playwrights and generally young men had gone Mae West, I fell for the tosh and went, too....went as far as the Biltmore, anyhow, and got what I doubtless deserved.

"Firstly, I saw a ham-greased imitation of "Burlesque" and about every other behind-the-scenes bunkum since "Zaza" was a centenarian. Secondly, I saw some heavily sprayed melodrama concerning a small-time headliner who, for his sins among the ladies is murdered in a manner too surgical for celebration in anything except the musical comedy just across the street from the Biltmore. Thirdly, much dragged in, I saw a "drag" and its inhabitants. I've already admitted, it was what I deserved.

"But seeing was only half the sickening. The--shall we call them female impersonators?-- were many, and were made to go through all sorts of perverted antics and Harlem bacchanales in various stages of robe and disrobe. What they had to speak was worse.

"Perhaps they enjoyed it. The fouler phases of exhibitionism may be interesting to pathologists--but they make for pathetic play-going, to say the least. And the least said here the decenter. If still curious send self-addressed, stamped envelope."

The Evening Post of October 2nd, 1928 in an article entitled "THE PLAY" by Robert Littell, states

"THEY DON'T COME ANY DIRTIER"

The article reads in part as follows:

> "To the Three tiresome and unspeakably slimy acts of "Pleasure Man" the police, by arresting the entire case, contributed a fourth, and even the most rabid opponent of official interference would find it hard to protest on this occasion.
>
> "The bulk of Mae West's latest is feeble back-stage melodrama, relieved by some mildly amusing characters and local color. If this were all, "Pleasure Man" would die unnoticed in a few weeks. But it is smeared from beginning to end with such filth as cannot possibly be described in print, such filth as turns one's stomach even to remember."

The Evening Post of October 2nd, 1928 has a picture of the arrest, and the defendants being taken in the patrol wagon, with an article entitled

"MAE WEST RAID OPENS CRUSADE TO PURIFY STAGE"

The article reads in part as follows:

> "MAYOR WALKER ALLEGED SPONSOR OF DRIVE TO REFORM BROADWAY"
>
> "DISTRICT ATTORNEY'S MEN GIVE 'RINGSIDE' CLEAN BILL"
>
> "FIFTY-FIVE ACTORS IN "PLEASURE MAN" ARRESTED AS 3,000 HOOT AND CHEER."

"When Mae West, the incorrigible writing lady,

bounced into West Side Court this morning to answer charges of writing an improper play, it became definitely known that New York is in for a season of theatrical dry cleaning.

"The police last night raided Miss West's sickly "Pleasure Man" at its Broadway premiere as only the first of a series of supervisory and punitive calls."

The Evening Graphic of October 3rd, 1928 carried large pictures of myself and members of the cast with reference to my previous conviction and sentence in connection with the play SEX.

The Evening Post of October 3rd, 1928 carries an editorial reading as follows:

> "We do not believe in censorship. But we also do not believe in plays of the type of Mae West's "Pleasure Man." The police did right in closing that show. It is most regrettable for it to be kept open by court injunction. If we are to have censorship, as Mr. Winthrop Ames has said, the best form of it is found in an occasional use of the police power against violations of public decency instead of a political censorship commission that walls itself up upon a constantly increasing body of precedent. But just because the police have done well in suppressing one evil production, they have no reason to range up and down Broadway throwing a mantle of fear over every playhouse."

The New York Times of October 4th, 1928, referring to the vacating of the temporary injunction by the Appellate Division, stated as follows:

"WALKER HOLDS CONFERENCE"

> "While argument was under way in the Appellate Division, Mayor Walker was in conference at the City Hall with Chief Assistant Corporation Counsel Nilly, Assistant District Attorney Kane, James P. Sinnott, Secretary of the Police Department, and several detectives who had participated in the "Pleasure Man" raid last Monday night."

The New York American of October 4th, 1928 prints a cartoon six by eight inches with the following editorial beneath

"Every citizen worthy of the name will applaud the earnest endeavor of the authorities to rout the vile "Pleasure Man" from the New York stage. Foisting of filth before the footlights finds no favor here.

"It was an "abuse of legal discretion," so a Justice of the Appellate Division holds, for a Supreme Court Justice to tie the hands of the police by means of an injunction. The public will welcome the higher court's decision as consonant with common sense.

"Mayor Walker, liberal Mayor of a liberal city, and foremost of its theatre patrons, voiced the community sentiment when he said:

"We shall not have disgusting or revolting degenerate plays for exhibition in this city. Producers of such shows. . .might just as well learn. . .that anything so offensive to the decency and morality of the citizens of this community cannot continue in this town while I am Mayor. The efforts of the police, what they have done and will do, have my hearty support."

The Herald Tribune of October 4th, 1928 carries an article entitled

"POLICE SUPPRESS MAE WEST PLAY ARRESTING 46"

The Evening Graphic of October 4th, 1928 has several pictures showing the arrest and headlined in large type

"PLAN TO INDICT MAE WEST"

The New York American of October 4th, 1928 headlines the story of the second raid as follows:

"MAE WEST PLAY CLOSED IN NEW RAID"

in letters one inch high.

The Evening World of October 5th, 1928 writes an editorial reading as follows:

"LAW AND PLAY"

A copy of the article is annexed to this affidavit.

The New York American of October 5th, 1928 features interviews and stories by prominent clergy and rabbis entitled

"CLERICS LAY STAGE FILTH TO PRODUCERS"

A copy of the article is reproduced and annexed to this affidavit.

The Evening World of October 5th, 1928 carries an article about the raid entitled

"MAE WEST TRIAL SPEEDED AS AN OBJECT LESSON"

The New York American on the same date prints an article entitled

"56 ARE INDICTED WITH MAE WEST IN STAGE DRIVE"

The Evening Graphic on October 5th, 1928 prints an editorial alongside the picture of Mayor Walker entitled

"CLEAN STAGE AND SCREEN"

A copy thereof is hereto annexed.

The Evening Graphic of October 5th, 1928 headlines the story

"MAE WEST, 53 PALS HELD FOR TRIAL"

The Sun of October 6th, 1928 carries the story entitled

"MAE WEST'S TROUBLES MULTIPLY"

"Second Indictments, Returned While Cast Was in Court, May Clinch Case Against Her."

The World of October 7th, 1928 has a special article entitled

"PUTTING BATH-SALTS IN DIRTY DRAMA"

The New York Times of October 7th, 1928 has an article entitled

"MAYOR'S PLAY RAID IS PRAISED BY SUMNER"

That article reads in part as follows:

"Two letters sent to Mayor Walker in approval of his action in suppressing the play were made public yesterday at the City Hall. One, ad-

dressed to the Mayor by John S. Sumner, Secretary of the New York Society for the Suppression of Vice, declared:

"I write to congratulate you on your energetic action with regard to the latest mess of theatrical dirt brought to our city.

"It has always been my opinion that the only way to effectively handle a dirty play and those connected with it is to "treat them rough."

"I hope that the action and accompanying words of Justice Dowling, reported in The World, will deter other Judges who are prone to give aid and comfort to the perpetrators of indecency at the expense of the public."

"The second letter was from Wendell Phillips Dodge, President of the American Theatre in Paris, sent from his office at 67 West Forty-fourth Street, who declared that the theatrical profession, including play producers, playwrights and actors, had joined the citizens of New York in "hearty endorsement" of the Mayor's stand against "Pleasure Man," and added that something drastic should be done to prevent objectionable performances in this city.

"Please accept my personal congratulations, as one Lamb to another, and as the American impressario of the world-famed Comedie Francaise and a clean play producer to our Mayor, who always has manifested a keen interest in the theatre," the letter concluded."

The World of October 7th, 1928 carries an article by Don Goddard entitled

"PLAY CENSORING NECESSARY, SAY FOUR PRODUCERS"

The article reads in part as follows:

"Following the police raid Monday night of Miss West's latest the Morning Telegraph, daily of the theatrical profession printed Wednesday a whole editorial column of commendation for the police action under the heading of "No Need for Such Shows."

"Broadway has enough troubles without adding the gutter type of amusements to its long list of fine dramas and musical shows.....The quick action of the police is to be commended."

The New York American of October 8th, 1928 has an editorial entitled

"LEGAL CENSORSHIP ONLY WAY TO KEEP OUR STAGE CLEAN"

A copy of the article is herewith annexed.

And the same paper on the same day has another editorial entitled

"ONE BAD APPLE SPOILS THE APPETITE!"

And underneath the editorial is printed a large cartoon, six by eight inches and reads as follows:

> "As a worm-eaten apple drives customers away from a fruit stand, so one unclean play spoils the appetite of the theater-going public for the offerings of Broadway. There is no excuse for the appearance on the fruit stand of the apple unfit to be eaten; there is no excuse for the public appearance of an unclean play.
>
> "Proper inspection BEFORE-HAND would keep the unfit fruit from public gaze; censorship, under the law, would bar from public presentation the efforts of money-mad producers to fling filth before the footlights.
>
> "The State Legislature should pass a Censorship Bill."

The Herald Tribune of October 7th, 1928 prints an article entitled

"JUST ANOTHER WHISTLE FOR THE POLICE"

That editorial reads as follows:

> "Miss Mae West's public, they say, is up in arms against the policemen who jailed her and her artists for presenting "The Pleasure Man." They regard the law's action as in insolent interference with their personal liberties, depriving them of the chance to exercise their rights as drama-lovers. If, they cry, such stumbling-blocks are allowed to impede the Stage's progress, Miss West will quite it before completing her mission. That, in the estimation of newspaper reporters who saw "The Pleasure Man," is of a character impossible to mention even on the Back Page."

"There should be no fear that Miss West's crusade will be permanently halted by the interruption of "The Pleasure Man." She has been under the hatches before without losing her enthusiasm. A dauntless girl, consecrated to her dubious cause, she emerges from the hoose-gows like a rosy martyr, determined to go onward. Her present dilemma is but a pause in the Theatre's advancement. Within a month or two she will have a worse one than "The Pleasure Man." And if she doesn't, some one else will. We wriggle a little, but we stand for anything."

The New York Telegram of October 8th, 1928 has an editorial entitled

"THERE'S A LIMIT."

reading as follows:

"We don't enthuse in general over censorship of the stage, but it is impossible to kick up any indignation over censorship of actors and producers who attempt to commercialize smut, obscenity, profanity and all around nastiness on the stage.

"Some of the rottenness recently pulled off on the New York stage would be out of place even behind a country barn and probably would have been barred in the Tenderloin of a generation ago.

"Somebody must apply the disinfectant, and if nobody else will do it we might as well yell for the police."

The New York Times of October 9th, 1928 carries an editorial entitled

"ASKS CLERGY TO UNITE TO BAN INDECENT PLAYS"

The Herald Tribune of October 10th, 1928 carries an article entitled

"LEAGUE'S AIM TO EDUCATE DRAMA LOVER DISCUSSED"

in which reference is made to a luncheon held by the New York Drama League.

The Evening Graphic of October 11th, 1928 has an article

entitled

"CENSOR TO NIP 'SEXY' PLAYS BEFORE PREMIERE"

The New York Sun of October 11th, 1928 has a long article entitled

"WALKER PICKS POLICE STAGE CRITIC"

in which there is recited Mayor Walker's plan to pre-view plays. The article reads in part as follows:

> "For this task the Mayor has recommended James P. Sinnott, secretary of the Police Department, in the belief that Mr. Sinnott, because of his long experience as a newspaper man and a dramatic critic, is peculiarly fitted for the duty. Another factor is Mr. Sinnott's experience in the suppression of such dramas as "Sex" and "Pleasure Man," and since the suppression of the latter exhibition of abnormality he has succeeded, it was said in having several lines of suspicious caliber clipped from productions which are now selling standing room only."

These articles demonstrate that the action of the Police that resulted in the arrests and raids, and the consequent suppression of the play aroused great discussion, and became a source of comment in the press. These vitriolic editorials were intended and did incite the public against the defendants herein and against me.

The entire community believes that the play the "PLEASURE MAN" was a low, indecent, lewd and obscene performance. After reading these articles, editorials, comments, interviews and public utterances by ministers, rabbis and city officials, it would have been impossible for the public to believe other than that the PLEASURE MAN was probably the worst play that has ever been written.

The press and the police stopped at nothing to arouse public sentiment against me.

To lend color to the charge that the players in "The Pleasure Man" were abnormal, a false story was fabricated and published in a number of the city papers on October 11, 1928, to the effect that Stan Stanley, one of the defendants herein, and an actor who portrayed one of the principal roles in the play, had been arrested in New Jersey for perversion and that he was held in bail of $5,000, later reduced to $2,000.

The story as it appeared in the Morning Telegraph of October 11, 1928, reads as follows:

"'PLEASURE MAN' ACTOR HELD ON SAILORS' CHARGE"

"STAN STANLEY AND FRANK CARMAN ARRESTED IN NEW JERSEY"

"Stan Stanley, one of the few bassos in the cane of the late 'Pleasure Man,' has been arrested in New Jersey on an odoriferous story told by two sailors, the State Police at Toms River reported yesterday.

"Arrested with him was Frank Carman of Brielle, N.J., also an actor.

"Stanley and Carman were seized on September 18, the police explain, and lodged in the county jail under a bail burden of $5,000 apiece. This was reduced later to $2,000 apiece, cash, a sum which both were able to raise.

"They are now awaiting the action of the Grand Jury, which went in session yesterday.

"As the State Police tell it, Stanley and his fellow actor were arrested after the two sailors told of a strange adventure they had on a road leading to the Naval Air Station at Lakehurst.

"Only a few days ago Stanley, with the other members of the 'Pleasure Man' cast, was released in $500 bail here after they had pleaded not guilty before Judge Koenig in General Sessions

to putting on a performance portraying degeneracy.

"That case is due to come up as soon as District Attorney Banton can get it on the calendar.

"Stanley was seized in both police raids on "Pleasure Man," being released on both occasions from the West Forty-seventh street station in bail of $500."

A similar story appeared the same day in the Daily News reading as follows:

"'PLEASURE MAN' STAR AND CARMAN JAILED"

"Troopers' Raid on Party In Jersey Revealed"

"Dawn dances on dewy lawns to the shrill vocal tune of high C has no esthetic standing in polite Brielle, N.J., society. Neither do the natives look with favor on invading cavorters from Manhattan who use their village as a way station for whoopee-making.

"This, it was learned yesterday, is the reason Stan Stanley of Mae West's raided "Pleasure Man" cast and Frank Barry Carman, Broadway character and divorced husband of the wealthy former Mrs. Hugo C. P. Schoellkoph of Buffalo, are awaiting grand jury action on a statutory charge.

"Carman, who was fired as a husband after a brief romance that followed the theft of his former wife's $520,000 jewels during a party in his New York apartment in 1923, bought a home in Brielle last May.

"Revelry at the Carman mansion was halted Sunday night when state troopers broke up the party and took Stanley and Carman to the Toms River hoosegow.

"Their troubles became more acute when two sailor guests from the naval air station at Lakehurst told a story of carnival that shook Brielle's moral rafters and compelled Carman and Stanley to post $2,000 bail each with Justice of the Peace A. C. King.

"Eleven men and five young women visitors from the metropolis viewed a wild law party that would have made Nero blush, the sailors admitted after a night in the Lakehurst brig."

There also appeared in conjunction with that story a picture of the defendant, STAN STANLEY.

The defendant, Stan Stanley, is a respectable married man who has four children, and who has never been in any trouble before. I am informed he was not in New Jersey at the time of the arrest, had no connection whatever with any criminal charge in New Jersey, at that time or at any other time, and was not placed under bail.

The newspapers wrote these articles in a further effort to inflame the public and to discredit the defendants before the public.

The defendant Stanley has had noopportunity to deny these articles, nor would the press print any such denial, with the result that the man has suffered grievously by reason of these false and libelous articles; his earning capacity has been impaired so that he could not obtain employment and he has been hounded and persecuted as the result of the tactics of the press and of the police.

There is not the slightest doubt that the public at large is of the opinion that the Appellate Division passed upon the merits of the play. In view of that situation, the opinion prevails generally throughout this community that the play, "The Pleasure Man", is lewd and objectionable and obscene; that it teems with degeneracy and sex perversion and that the defendants and I are undoubtedly guilty.

In the public mind, the defendants and I have already been convicted. Without a trial, without a hearing, without anyone having, as yet, read the manuscript of the play, the defendants and I stand convicted before the Bar of Justice.

The sense of the community is that we are guilty. The public has become excited and aroused by the publicity attendant upon the raids and the indictment and the public has become biased and prejudiced against the defendants and me.

It is impossible to select a jury of twelve impartial

men in this county or, indeed, in this city and in any adjacent county that would give the defendants and me a fair and impartial trial.

For many weeks the press has pounded away at the defendants and me. There has been no cessation. The public is prepared to see these 56 defendants and myself brought into court for a Roman Holiday.

This indictment is a very serious thing to these defendants and to myself. If found guilty, the punishment would be most severe. Most of these defendants are without funds. They have been dependent upon their small salaries, which they have lost by reason of the suppression of the play. They are poor actors out of work, without resources, without funds, many of them without families and without friends.

Against this public clamor, so grievously aroused by the press and the police, these defendants stand helpless and alone. They cannot with their feeble strength fight the aroused sense of the community and it would be a mockery to try these defendants and me before a jury drawn from this community.

We are entitled to a fair trial and to an impartial trial. We ask for nothing more.

On behalf of these defendants and myself, I, therefore pray that this court in its good discretion take unto itself the indictment and trial of this action and remove the same from the Court of General Sessions of New York County and

this court make an order changing the venue of the trial to another county within this state, to the end that there an impartial trial may be had, and I earnestly pray this court to grant me this relief in the interest of justice and fairness; for all of which no previous application has been made to any court or judge.

The originals of the articles in the press, hereinabove referred to, are incorporated herein by reference and will be handed up to the court on this motion.

Sworn to before me this
5th day of November, 1923.

SUPREME COURT : NEW YORK COUNTY.

* *

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

MAE WEST, et al,

Defendants.

* *

STATE OF NEW YORK,)
COUNTY OF NEW YORK,) SS.:
COUNTY OF NEW YORK,)

STAN STANLEY, being duly sworn, deposes and says:

I am one of the defendants herein, and join in this application for a change of venue.

I am an actor by profession and have been such for twenty-four years.

I am married, and live with my wife and family of four children.

I was engaged to play the star comedy role in the play "Pleasure Man", and was arrested together with the other defendants, and was subsequently indicted.

I have never been indicted nor convicted of any offense, have never had any trouble with the police, and am a respectable citizen.

My salary as an actor has run as high as $300. a week and I am favorably known in the profession and have played ~~in~~ most of my life on the vaudeville stage and particularly what is known as the "Big-time Circuit", formerly the Keith-Albee Circuit, which plays the best vaudeville houses in the country.

My reputation has been above reproach.

After the indictment herein, stories appeared on or

about October 11, 1928 in several of the New York City papers to the effect that I had been arrested with one Carman in New Jersey on a serious charge made by two sailors. The innuendo of the article is that I was arrested for an act of perversion.

The articles appeared particularly in the Morning Telegraph of October 11, 1928 and in the Daily News of October 11, 1928, both articles being set out in full in the accompanying affidavit of Miss West, verified November 5, 1928.

In one of the articles, to wit, the one published in the Daily News, my picture appeared.

I deny that I was arrested in New Jersey at that time or at any other time.

I deny knowing any man named Carman.

I had nothing do so with any arrest in New Jersey either in October, 1928 or at any time previous thereto or at any time subsequent thereto.

The connection of my name and photograph with this story is absolutely unfounded. These articles insofar as they affect me are false in every particular. I have never had any trouble of any nature for any alleged act of perversion.

I was not held in bail in New Jersey. I was not indicted in that state, and the entire story is a fabrication and a falsehood.

The story has affected me in my profession most grievously. All my friends and acquaintances and all the members of the theatrical profession have been of the opinion that the articles mentioned were true, and the injury done

to me by the publication of these false articles is something that cannot be estimated.

It has prevented me from obtaining employment, and I have been informed by my booking agents that the vaudeville circuits will not give me employment because of the publication of these false,untrue and libelous articles, and by reason of the notoriety occasioned by these articles I am unable to obtain lucrative employment of any kind at this time. With the exception of an occasional or sporadic booking of a few days, I have been unable to continue the practice of my profession.

By reason of the premises I have been thoroughly discredited and the public has been led to believe that I am a pervert and that I have been arrested and put under bail for an act of perversion.

I have been unable to obtain any satisfaction for the publication of these articles. I am unable to have these articles denied in print, for the reason that the papers are apparently determined to keep me in a bad light before the public, and by reason of the premises, this community has been aroused and inflamed against me and I will be unable further to obtain a fair and impartial trial on this indictment.

Sworn to before me this

5th day of November, 1928.

Grace Stanley

SUPERSEDING INDICTMENT

COURT OF GENERAL SESSIONS OF THE

COUNTY OF NEW YORK.

- X

THE PEOPLE OF THE STATE OF NEW YORK

-against-

MAE WEST, CARL REED, CHARLES EDWARD DAVENPORT, STAN STANLEY, ALAN BROOKS, JAY HOLLY, WILLIAM AUGUSTIN, CAMILIA CAMPBELL, EDGAR BARRIER, ELAINE IVANS, LEO HOWE, LESTER SHEEHAN, MARTHA VAUGHN, EDWARD HEARN, WILLIAM SELIG, HERMAN LENZEN, JULIE CHILDREY, MARGARET BRAGAW, ANNA KELLER, JANE RICK, FRANK LESLIE, WILLIAM CAVANAGH, CHARLES ORDWAY, CHUCK CONNORS the Second, FRED DICKENS, HARRY ARMAND, SYLVAN REPETTI, GENE DREW, ALBERT DORANDO, LEW LORRAINE, JOE HUDDLESTON, WALTER MacDONALD, GENE PEARSON, HOWARD CHANDLER, JAMES AYERS, AUGUSTA BOYLSTON, MARGUERITE LEO, KATE JULIANNE, MAY DAVIS, EDWARD ROSEMAN, JOE DELANEY, ROBERT COOKSEY, ROBERT DeMARCHE, JAMES CLARK, GEORGE CARTIER, PHILIP KIRSCHEN, PHILIP GROSSMAN, RICHARD READ, FRED CARLTON, HARRY BONER, RUDOLPH CORMILLO, TOMMY DENTON, FRANK RINDHAGE, FRANK SPENSER, KUNI HARA, WALLY JAMES, TOD LEWIS,

DEFENDANTS.

- -X

THE GRAND JURY OF THE COUNTY OF NEW YORK, by this indictment, accuse THE SAID DEFENDANTS of the Crime of UNLAWFULLY PREPARING, ADVERTISING, GIVING, DIRECTING, PRESENTING AND PARTICIPATING IN AN OBSCENE, INDECENT, IMMORAL AND IMPURE DRAMA, PLAY, EXHIBITION, SHOW AND ENTERTAINMENT, committed as follows:

The said defendants, on the first day of October, nineteen hundred twenty-eight, and for some time thereafter, at a certain building and theatre in said county situate

and known as the Biltmore Theatre, unlawfully did prepare, advertise, give, present and participate in an obscene, indecent, immoral and impure drama, play, exhibition, show and entertainment, and obscene, indecent, immoral, impure scenes, tableaux, incidents, parts and portions of said obscene, indecent, immoral and impure drama, play and exhibition, which said obscene, indecent, immoral and impure drama, play, exhibition, show and entertainment was then and there called "PLEASURE MAN", a more particular description of which said obscene, indecent, immoral and impure drama, play, exhibition, show and entertainment and said scenes, tableaux, incidents, parts and portions thereof would be offensive to this Court and improper to be spread upon the records thereof, wherefore such description is not here given, which said drama, play, exhibition, show and entertainment and said scenes, tableaux, incidents, parts and portions thereof tend and at all times herein mentioned tended and would tend to the corruption of the morals of youth and others, and in such acts unlawfully each other the said defendants did aid and abet; against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

SECOND COUNT --

AND THE GRAND JURY AFORESAID, by this indictment, further accuse THE SAID DEFENDANTS of the Crime of UNLAWFULLY PREPARING, ADVERTISING, GIVING, DIRECTING, PRESENTING AND PARTICIPATING IN AN IMMORAL PLAY AND EXHIBITION, committed as follows:

The said defendants, on the day and in the year aforesaid, in the county aforesaid, unlawfully did prepare, advertise, give, direct, present and participate in a certain exhibition, show and entertainment, being the same exhibition, show and entertainment described in the first count of this indictment, to which reference is hereby made, and certain scenes and tableaux in said exhibition, show and entertainment, all then and there depicting and dealing with the subject of sex degeneracy and sex perversion, and in such acts unlawfully each other the said defendants did aid and abet; against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

THIRD COUNT --

AND THE GRAND JURY AFORESAID, by this indictment, further accuse THE SAID DEFENDANTS of the Crime of MAINTAINING A PUBLIC NUISANCE, committed as follows:

The said defendants, on the day and in the year aforesaid, in the county aforesaid, contriving and wickedly intending so far as in them lay, to debauch and corrupt the morals of youth and of other persons and to raise and create in their minds inordinate and lustful desires, unlawfully, wickedly and scandalously did keep and maintain a certain theatre and playhouse there commonly known as the Biltmore Theatre for the purpose of exhibiting and exposing to the sight of any persons willing to see and desirous of seeing the same and of paying for admission into the said theatre, a certain wicked, lewd, scandalous, bawdy, obscene, indecent, infamous, immoral and impure exhibition, show and entertain-

ment, being the same exhibition, show and entertainment described in the first count of this indictment, to which reference is hereby made, and in the said theatre, at the time aforesaid, did unlawfully, wickedly and scandalously, for lucre and gain, produce, present, exhibit and display the said exhibitbn, show and entertainment to the sight and view of divers and many people, all to the grent offence of public decency, against the order and economy of the state and to the common nuisance of all the people, and against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

JOAB H. BANTON,

District Attorney.

"PLEASURE MAN"

ACTORS	SALARY
J. F. Ayers	$50.
Camedlia Campbell	150.
Alan Brooks	400.
Mr. and Mrs. Stanley	400.
Anna Keller	25.
Wm. Cavanaugh	35.
Augusta Boyston	25.
Wally James	150.
Edgar Barrier	65.
William Augustin	100.
Elaine Ivans	75.
Margaret Bragaw	30.
Jane Rich	25.
Jay Holley	100.
Martha Vaughan	75.
Fred Dickens	35.
Chuck Connors, Jr.	40.
Ed Roseman	50.
Kate Julianne	35.
Marguerite Leo	35.
May Davis	35.
William Selig	100.
Herman Lenzen	100.
Indiana "5" Band	625.
Harry Armand	35.
Leo Howe	75.
Lester Sheehan	100.

ACTORS (Continued)	SALARY
Ed. Hearn	135.
Charles Ordway	35.
Gene Drew	30.
Joe Huddleston	30.
Walter MacDonald	30.
Philip Crossman	25.
Frank Rindhage	25.
Robert De March	25.
Jack Denton	25.
Richard Read	25.
Fred Carlton	25.
Harry Boner	25.
Rudolph Cormillo	25.
George Cartier	25.
Albert Dorando	25.
James Clarke	25.
Sylvan Repetti	40.
Lew Lorraine	35.
Gene Pearson	100.
Howard Chandler	35.
Philip Kirschen	25.
J. Kunihara	35.
Joe Delaney	15.

New York American, October 3, 1928.

WALKER ORDERS CLEAN-UP OF STAGE

THERE'S NO PLACE ON STAGE FOR MONEY-MAD EXPLOITERS OF FILTH.

"The Pleasure Man," an outrageous and salacious attempt to make money by shocking the sensibilities of our citizens and visitors, has no place upon the stage of this city, the dramatic centre of the world.

Filth belongs in the gutter, and not before the footlights to smear and tarnish a great and noble calling. Sporadic attempts to exploit obscenity here should be ruthlessly stamped out. Misguided men and women, whose god is gold, should never be permitted to bring the dramatic profession into disrepute. The greatmajority of those who make their living in the theatre are disgusted with the efforts of the few to drag dirt before the spotlight under the guise of "art."

"The Pleasure Man" threatened us last season, but under the name of "The Drag." Then it was rightly branded sheer filth and was scourged from the stage of neighboring cities. Rewritten in parts, Monday it again reared its ugly head, and was so obnoxious that it disgusted confirmed first nighters and hard-boiled police.

Mae West, its author, who served a workhouse term last season for her part in an obscene play, and fifty-four men and women associated with her in "The Pleasure Man," were arrested on its opening night. Under the law the theatre may be padlocked for one year if they are convicted.

To permit this show to continue its public parade of pruriency is a sickening stench in the nostrils of decent citizens, a hard blow at the legitimate theatre, a severe setback for the producers of clean, wholesome plays and an unwarranted aspersion on the fair name of this city.

This is the third time this season that police have acted promptly to checkmate exploited obscenity. Thus does Father Knickerbocker deal with dirt on the stage.

Daily News, October 8, 1928.

FILTH ON THE STAGE.

Mae West and the cast of her new play, "Pleasure Man," are arrested after the play's opening Manhattan performance.

In this instance we think the police were quite right in swooping down on a Broadway production.

The subject matter of "Pleasure Man" is beyond the pale. Most of the critics say the show is badly staged, badly acted and a bore from first to last.

Thus the case is different from those of "Maya" and "Strange Interlude," which dealt honestly with things as they are. Contrast those plays with "Pleasure Man" and you have one guide to show where censorship should begin and where it should end.

It is understood that Mayor Walker instigated the raid on "Pleasure Man." The mayor, we believe, did the proper and courageous thing in moving against a play which has nothing to commend it.

Daily News, October 4, 1928.

PERVERSION BY INJUNCTION.

Miss Mae West puts on a play called "Pleasure Man." It deals with the subject of sexual perversion. If such a play does not necessarily contravene public morals, we don't know what sort of play would.

The police, thinking themselves empowered to safeguard morals and stop indecent acts in public, arrest producer and cast.

But Supreme Court Justice Louis A. Valente issued an injunction. The injunction forbade the police to interfere further until next Friday. The show went on for another night and a matinee.

Yesterday, Presiding Justice Dowling in the Appellate Division vacated the injunction - very properly we think.

The injunction prospers greatly nowadays. Whats the next step? Will judges presently be enjoining police from interfering with stickups and murderers?

New York American, October 6, 1928.

CLERGY DIVIDED ON POLICE CENSORSHIP OF THEATRE.

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RABBI GROSS CALLS RAIDS 'JUST A JOKE'

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OTHERS COMMEND ACTION TAKEN BY WALKER; DR. BEESCH HOLDS PUBLIC TO BLAME FOR FILTH

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Is police station the best method of handling indecency in the theatre?

Several prominent clergymen came forth yesterday to back Mayor Walker in his move to "clean up" the theatre.

DR. LOUIS GROSS, rabbi of the Union Temple, Eastern Parkway, Brooklyn, however said:

"Police censorship of the drama, spurred on by the indignant self-righteous custodians of public and private morals, is the joke of our day. While the raids are made on Broadway, the devil sits back and chuckles.

"Because that method of censorship only adds fuel to the falmes of salacious appetites and gives bad plays an enormous amount of good publicity free of charge.

"I don't need the police to tell me how to take my drama any more than I need them to tell me how to take my food. Such censorship is an insult to every decent-minded person, and I have a notion that the vast majority of people are at least decent-minded.

"What is needed is to educate the public taste for drama. Instead of attacking bad plays, the indignant reformers, so solicitous of our welfare, should boost good plays. Let the preachers forget for a moment to fight about theology and devote their energies to building up esthetic as well as spiritual sensibilities in the masses of the people, and the so-called bad plays will sink under the sheer weight of their own badness."

Rev. C. EVERETT WAGNER, pastor of the West Side Methodist Church, No. 461 West Forty-fourth Street, said:

"Mayor Walker should be highly congratulated on his late action to cleanse the stage. Indecent plays are the bane of Broadway's existence. They ruin whatever clean minds come in contact with them.

"It is a pity that authors and producers, calling themselves men and women, can portray such downright indecency. Humanity has enough lewd things to contend with in life without being tempted by rotten plays.

"And if there is no other way to stop the transh, then it is better to use police authority. Everyone connected with an unclean production is to blame. And the public, foolish as it is, is to be pitied for supporting such blasphemy and lasciviousness."

REV. DR. HENRY DARLINGTON, pastor of the Protestant Episcopal Church of the Heamenly Rest, No. 67 East Eighty-ninth street, said:

"I am highly in favor of police authority closing down the theatres showing indecency. The theatre is too fine an institution to corrput with such filth.

"It seems, though, that from all the ways devised for dealing with indecency in the theatre, that some worthy plan could be perfected. It doesn't do any good, apparently, to send the offenders to jail. It only serves to give them wide publicity.

"But so long as nothing has been found to curb the rotten play, police interference seems the only solution."

REV. DR. JOHNSTONE BEESCH, assistant pastor of St. Mark's on the Bouwerie, had this to say:

"Most of the blame for the indecent plays can be placed on the public. We cannot blame the authors, the actors nor the producers. They have to make a living, and it is their business to put those plays on which will make money.

"The source of the public's blame, however, is in our schools. Men and women have not been taught to value and cherish the finer things. Our schools do not educate, they are just machines. The churches, too, are a bit to blame. Beauty, if properly taught, will fill the minds of persons.

"Of course, this does not eliminate the producer and the author entirely. They are to blame for creating the filth in the first place. And then for taking advantage of a curious and gullible public. Although it is unfortunate, man is a little rebellious and is likely to lean toward the forbidden."

New York American, October 9, 1928.

NOBODY LIKES THE PRINCIPLE OF CENSORSHIP, BUT IT WILL SAVE THE STAGE AS IT DID THE MOTION PICTURES

A vote of thanks is due to Mayor Walker, Police Commissioner Warren and District Attorney Banton for stopping the pestilence of pruriencey that was turned loose upon the New York theatre public a week ago last night.

Mayor Walker directed the police to act. Under Police Commissioner Warren they struck and stuck so hard that the producer gave it up after being raided twice. And now District Attorney Banton proceeds to a vigorous prosecution of the principals involved, who face prison terms up to three years in addition to fines.

These public spirited officials rightly realized that in this show they were fighting the artistic equivalent of malignant diseases like typhoid or diphtheria, let loose upon the youth of the land.

Under what principle do we maintain departments of health to guard from contamination the bodies of our boys and girls, while neglecting to properly protect their minds from contamination?

If public officials had not acted, the people themselves would have found a way to act. They do not propose to stand for an unclean and degenerate stage.

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Meanwhile, it is idle to talk of the competition of the movies as the chief trouble-maker for the drama. Its chief trouble is its lack of self-control. It is its own worst enemy.

In principle, nobody likes censorship. But censorship is now clearly the salvation of the stage as it has proved the salvation of motion pictures.

The motion picture industry has not found itself hampered, either in its profits or in its artistic scope, by staying within the limits of decency as laid down by the censors.

On December 30, 1926, William Randolph Hearst demanded censhoship for the drama and gave a striking illustration of what censorship had done for the movies:

"Something permanent is necessary, some influence outside of the producers themselves, some body with authority to compel adherence to proper moral standards.

"It is unfortunate that the stage has degenerated to a point where censorship is necessary, but even the opponents of censorship, like the New York American has been,

are compelled to realize that some governmental supervision is necessary in order to redeem the drama.

"The effect of censorship, or of this fear of censorship, can be easily estimated by the fact that the great firm which produces many of the very best and cleanest and highest class moving pictures in the United States is responsible for one of the most vicious and obscene plays that has disgraced the stage in this year of nineteen hundred and twenty-six.

"Without the influence of censorship, this firm might have produced moving pictures as demoralizing as the stage play, and certainly under the influence of censorship it would have abstained, and would have been compelled to abstain, from inflicting the injury on American morals that it has inflicted with its degrading stage production."

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Seeing that we still lack the machinery to prevent theatrical diseases, we should be grateful when their spread is checked by the concerted action of public servants like Mayor Walker, Police Commissioner Warren and District Attorney Banton.

New York American, October 5th, 1928.

CLERICS LAY STAGE FILTH TO PRODUCERS.

Who is to blame for the indecent plays? The producer? The actors? The author?

With New York's attention redirected to the indecent play situation, several prominent clergymen yesterday commented on these questions.

GEORGE REID ANDREWS, executive director of the Church and Drama Association, with offices at No. 105 East Twenty-second street, said:

"The actors are the least responsible for indecency in the theatre. It stands to reason that the producer and the playwright are the most guilty.

"Men need to play as well as to pray. The church is recognizing the place and value of the theatre in our complex civilization and is throwing the weight of its influence on the side of the men and the women in the theatre who are striving for high artistic and cultural standing.

"There are producers who are not amenable to the dictates of art and decency. They fear only the hand of the law. The Mayor and the District Attorney should have the support of the public in their efforts to drive from the stage the vendors of filth, who are the enemies of every true artist and actor."

DR. J. F. FRAZER, pastor of the Central Baptist Church, Amsterdam avenue and Ninety-second street, had this to say:

"I don't know the character of plays being produced on Broadway this season, but I never was more proud of Mayor Walker than at his recent action with a play, which, according to the newspapers, was plain vulgarity. I think Mayor Walker is a credit to his administration.

"The flagrant injection of filth in the theatre seems to be growing from year to year. It isn't doing the State any good, it isn't elevating art, it isn't doing anything but fill the pockets of the ungodly producers."

DR. ALLEN M. FAIRBANKS, pastor of St. Paul's Congregational Church, Church avenue and St. Paul's place, Brooklyn, said:

"The theatre is a noble and fine art. Why it must be tainted with the indecent pieces that find their way into the hands of the lewd is beyond

human understanding.

"I feel the most hopeful method of dealing with plays is that of the Church and Drama Association. Their selections are always worthwhile and wholesome. Immorality should be kept as far from the theatre as possible. Surely those pieces do nothing toward the art of drama. I am sure no one can call an indecent production art."

RABBI NATHAN KRASS, of Union Temple, Eastern Parkway, Brooklyn, said:

"Although I am not an authority on the theatre, and although I haven't seen any productions that have been immoral because I don't care to see them, it seems to me that immorality should be outcast by the producers themselves.

"It is not the fault of an actor who may be in need of a job. It is, in part, the fault of an author who writes such trash in the first place.

"But finally the blame descends full upon the head of a producer who deliberately, for money, puts an indecent play upon a Broadway stage. Punishment should be centred there."

Evening World, October 5, 1928.

LAW AND PLAY

Indictments under Section 1140A of the Penal Code were handed down by the Grand Jury yesterday against Mae West, actress-author, and her company for conspiracy to give an indecent performance at the Biltmore Theatre. The play in question is "Pleasure Man," which had been twice raided before the matter was called to the attention of the Grand Jury. This action by this body was taken because of lines in the play said to be indecent and because of gestures said to be revolting. The jury in the trial will determine.

Thus, it is clear that no censorship law is needed in this city for proceeding against indecent plays. We have a law in the Penal Code that covers such as these. All that is needed is the enforcement of the law.

The effect of the action taken is already felt in the fact that the producers of other plays, not so bad and yet bad in spots, are said to be busy with voluntary deletions. The fact that Mayor Walker, who has taken a stand against "revolting and indecent plays," ordered the last raid has put something of the fear of the Lord into the hearts of some of the managers, and the indications now are that we may be able to get through the present season with a decent regard for the ordinary proprieties.

Evening Graphic, October 5, 1928.

CLEAN STAGE AND SCREEN.

PROMPT ACTION of the mayor and the police in putting off the boards a play that is indecent beyond description shows what a tremendous power rests in the hands of alert officials to suppress evil conditions on the stage and elsewhere.

This is a point that should be kept in mind when next some person or group raises a cry for stage censorship.

We are already plague-ridden with a multiplicity of censors, official and otherwise, who meddle in the personal affairs of American citizens.

It is a pity that our Legislatures at times listen to the shrill clamor of a prejudiced minority and put on our statute books laws that interfere seriously with the ordinary human rights of human beings.

In New York one of the worst laws on this subject is the motion picture censorship law, a statute that puts into the hands of politicians the right to determine what constitutes drama.

That movie censorship is viciously useless is proved by the manner in which the offensive stage production, above mentioned, was kicked out.

That movie censorship has had a tendency to take the vitality and life out of the silent drama is evident.

This obnoxious measure should be eliminated as soon as possible. Its presence in our statutes gives too much encouragement to the blue-nosed hypocrites who want to regulate the affairs of others.

New York American, October 8, 1928.

LEGAL CENSORSHIP ONLY WAY TO KEEP OUR STAGE CLEAN.

Contrary to our opinion that censorship was not necessary and that the present laws were adequate if enforced, we are obliged to change our views because of the character of some shows that have been produced on the New York stage. Censorship in advance of production seems to be the only means of keeping the stage clean.

Not the advent of the talking movie will sound the death knell of the American stage, but the pruriency of the stage itself will do so, unless radical measures are taken to keep the theatre clean and wholesome.

New York needs a rigid censorship law that will prevent even a first night of such disgraceful shows as are becoming more and more frequent in this city.

* * *

We give due respect to the action of the police who twice raided the latest outrageous production, and to the Grand Jury which indicted the producer, author and players.

Nevertheless, it is a case of locking the door after the horse is stolen. The indecent plot and lines, appearing three times on Broadway, are spreading through the nation.

This play, before coming to Manhattan, was exhibited sixteen times in The Bronx and in Queens. The attention of the police had been called to it. Whatever changes may have been promised or made in the lines, the theme was such that the play could not possibly have been made fit for public presentation. Besides, what kind of a system is it that protects Manhattan citizens from degenerate plays while letting them loose on citizens of The Bronx and Queens?

We have waited long enough for the theatrical producers themselves to "clean up." On December 28, 1926, Mayor Walker told them

"that if they cannot get together in some form for the improvement of the character of theatrical performances, I will have to find a way to do it for them."

Two days later William Randolph Hearst proposed on this page:

"To extend the authority of the Board of Censors, which now censors moving pictures, so as to make it include stage production.

"There are certain inconveniences in censorship, certain injustices, in fact, certain dangers, if the censorship system is used.

"But there is nothing in censorship which carries so great a menace to the life of the nation, to the moral standards of the American people, as the appalling degeneracy of the present-day drama.

"The actual process of censorship may not have done so much to make moving pictures cleaner than they were, but the fear of censorship, the dread of what censorship would do to the picture, if the producer transgressed, has been almost entirely responsible for the redemption of moving pictures."

* * *

A BILL for State censorship was introduced in the 1927 session of the New York State Legislature. It was sidetracked in order to give the theatrical producers another year in which to try their proposed plan of self control. They have had two years.

No producer would have financed this latest outrage if we had had a stage censor empowered by law to kill such a play without recourse to the delays and chicanery of tricky legal procedure.

Let's have a Censorship Bill go through the 1929 Legislature as soon as it meets in January.

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New York City

Esq .,

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

vs.

MAE WEST, et al,

Defendants.

AFFIDAVITS AND NOTICE OF MOTION FOR CHANGE OF VENUE.

NATHAN BURKAN

Attorney for Defendants except Davenpo

(Office and Post Office Address)

1451 BROADWAY

Borough of Manhattan New York City

To Esq .,

Attorney for

Service of a copy of the within

is hereby admitted.

Dated, N. Y., 192

Attorney for

STATE OF NEW YORK, } ss.:

COUNTY OF

, being sworn deposes and says that he is

the attorney for the above named

herein. That on the day of 192 he served the within

the attorney for the above named

by depositing a true copy of the same securely enclosed in a post-paid wrapper in the Post-Office—a Post Office Box regularly maintained by the United States Government at

Post Office—a Post Office Box in said County of directed to said attorney for the

at No. N. Y., that being the

within the state designated by h for that purpose upon the preceding papers in this

the place where h then kept an office, between which places there then was and

regular communication by mail.

Sworn to before me, this

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COURT OF GENERAL SESSIONS OF THE

COUNTY OF NEW YORK.

- X

THE PEOPLE OF THE STATE OF NEW YORK

- against -

MAE WEST, CARL REED, CHARLES EDWARD DAVENPORT, STAN STANLEY, ALAN BROOKS, JAY HOLLY, WILLIAM AUGUSTIN, CAMILLA CAMPBELL, EDGAR BARRIER, ELAINE IVANS, LEO HOWE, LESTER SHEEHAN, MARTHA VAUGHN, EDWARD HEARN, WILLIAM SELIG, HERMAN LENZEN, JULIE CHILDREY, MARGARET BRAGAW, ANNA KELLER, JANE RICH, FRANK LESLIE, WILLIAM CAVANAGH, CHARLES ORDWAY, CHUCK CONNERS the Second, FRED DICKENS, HARRY ARMAND, SYLVAN REPETTI, GENE DREW, ALBERT DORANDO, LEW LORRAINE, JO HUDDLESTON, WALTER MacDONALD, GENE PEARSON, HOWARD CHANDLER, JAMES AYERS, AUGUSTA BOYLSTON, MARGUERITE LEO, KATE JULIANNE, MAY DAVIS, EDWARD ROSEMAN, JOE DELANEY, ROBERT COOKSEY, ROBERT DeMARCHE, JAMES CLARK, GEORGE CARTIER, PHILIP KIRSCHEN, PHILIP GROSSMAN, RICHARD READ, FRED CARLTON, BARRY BONER, RUDOLPH CORMILLO, TOMMY DENTON, FRANK RINDHAGE, FRANK SPENSER, KUNI HARA, WALLY JAMES, TOD LEWIS,

Defendants.

- X

DEFENDANTS' MEMORANDUM ON MOTION TO INSPECT MINUTES OF THE GRAND JURY.

The defendants herein have moved this court for an inspection of the minutes of the Grand Jury.

The defendant Charles E. Davenport moves separately by his attorney, and the defendant Alan Brooks is moving on behalf of himself and on behalf of all the other defendants (except Davenport), who joined with him in this application.

There are fifty-seven defendants named in the superseding indictment (hereinafter referred to as "the indictment").

The indictment alleges three counts, which, briefly, are as follows:

FIRST COUNT: The defendants are accused of the crime of unlawfully preparing, giving, directing, presenting and participating in an obscene, indecent, immoral and impure drama, play, exhibition, show and entertainment, and of unlawfully aiding and abetting such acts.

SECOND COUNT: The defendants are accused of unlawfully preparing, advertising, giving, directing, presenting and participating in an immoral play and exhibition, and certain scenes and parts thereof dealing with sex degeneracy and sex perversion, and of aiding and abetting in such acts.

THIRD COUNT: The defendants are accused of maintaining a public nuisance.

The First Count is alleged to be a violation of Section 1140a of the Pensl Law and particularly of subdivision 1 of that section (more popularly known as The Wales Act).

That subdivision of Section 1140a reads as follows:

> "1. Any person who as owner, manager, producer, director, actor or agent or in any other capacity, prepares, advertises, gives, directs, presents or participates in, any obscene, indecent, immoral or impure drama, play, exhibition, show or entertainment, or any obscene, indecent, immoral, impure scene, tableau, incident, part or portion of any drama, play, exhibition, show or entertainment, which would tend to the corruption of the morals of youth or others; or who, * * * ."

The Second Count of the indictment is based upon subdivision 2 of Section 1140A, which subdivision reads as follows:

> "2. Prepares, advertises, gives, directs, presents or participates in, any drama, play, exhibition, show, entertainment, scene or tableau depicting or dealing with, the subject of sex degeneracy, or sex perversion; * * *."

"3. Every person aiding or abetting any such act, and every owner, lessee, or manager of any theatre, garden, building, room, place or structure, who leases or lets the same or permits the same to be used for the purposes of any such drama, play, exhibition, show or entertainment, or any such scene, tableau, incident, part or portion of any drama, play, exhibition, show or entertainment, knowingly, or who assents to the use of the same for any such purposes; shall be guilty of a misdemeanor.

"In any case of a conviction for a violation of this section, where the violation occurred upon premises licensed for any public exhibition, drama, play, show or entertainment, the licensing authority shall have power to revoke such license upon proof of such conviction; and upon such revocation such licensing authority shall have power to refuse a new license affecting such premises for a period not exceeding one year from the date of such revocation."

The Third Count of the indictment is based upon Section 1532 of the Penal Law, which section reads as follows:

"Maintaining Nuisance.

"A person who commits or maintains a public nuisance, the punishment for which is not specifically prescribed, or who wilfully omits or refuses to perform any legal duty relating to the removal of such a public nuisance, is guilty of a misdemeanor."

The indictment fails to specify which parts of the play "Pleasure Man" are claimed to be obscene, indecent, immoral and impure. It fails to specify in which respect this play and its scenes and tableaux depicted and dealt with the subject of sex degeneracy and sex perversion, and it fails to specify in what way the said play was so wicked, lewd, scandalous, bawdy, obscene, indecent, infamous, immoral and impure, that it constituted a common nuisance.

The reason assigned in the indictment for the failure to allege any of the specific details is that "the said scenes, tableaux, incidents, parts and portions thereof would be offensive to this court and improper to be spread upon the records thereof."

The moving affidavit contains a synopsis of the story of the play, from which it is manifest that there is nothing indecent, obscene, impure or improper in the play.

The presumption that the said play was not obscene nor impure is strengthened by the fact that District Attorney McGeehan of Bronx County permitted it to be played in that County for an entire week of eight performances, and that the District Attorney of Queens County permitted it to be played in that County for a week of eight performances.

The play was raided on the first night of its appearance in New York County, and all of the principals of the cast, together with the defendant West, were arrested that night.

No preliminary hearing was ever held in the Magistrate's Court, and the proceedings before the Magistrate were withdrawn and the defendants directly indicted by the Grand Jury.

The first indictment merely alleged a violation of Section 1140a of the Penal Law; that is, the presentation of an obscene play. The superseding indictment charges the defendants with three crimes for the same offense.

It is the defendants' contention that the lines of the play "Pleasure Man" were absolutely harmless.

The only way in which an indictment could have been found in this case would have been by having the witnesses before the Grand Jury testify to their own version of the lines of the play; in other words, that such witnesses undoubtedly destroyed the meaning of the lines in the play and gave to innocent and harmless words a sinister and criminal interpretation.

Furthermore, evidence was given as to the meaning of the language used in the play.

Moreover, the testimony before the Grand Jury will show that certain lines were taken out of the play after its first performance, and that the witnesses before the Grand Jury made much of that fact, and inflamed the Grand Jury thereby, and led that Jury to believe that because lines were deleted and omitted at subsequent performances, they, therefore, must have a sinister and criminal meaning.

Furthermore, the testimony before the Grand Jury will undoubtedly show that it is not the text of the play that was objected to by the People, but, rather, the fact that certain male characters in the play impersonated women, and sang and danced in the manner of women, and that the witnesses before the Grand Jury led that Tribunal to believe that such female impersonators were thereby violating the law, when, as a matter of fact, there is no statute in this State which prohibits female impersonators from singing and dancing on the stage in the garb of women or by actions or gestures imitating feminine roles.

An examination of the minutes will disclose that the People claim that the appearance of female impersonators in the play, without any lewd or indecent gestures, actions, business or lines, of itself constituted a subject of sex degeneracy and sex perversion.

Moreover, it is manifest that this blanket indictment of fifty-seven defendants cannot possibly be good as against all of the defendants on all of the three counts of the indictment. The absurdity of indicting fifty-seven defendants on these three counts becomes manifest when it is

considered that one of the defendants is the producer of the play, one of the defendants is alleged to be the author of the play, one of the defendants is alleged to be the director of the play, and all of the other defendants are actors in the play.

How can the actors, for example, be guilty of maintaining a nuisance, which is the third count of the indictment? Where would the authoress of the play be guilty of the same count?

Although the statutes of New York provide that an indictment must state specifically the crime which is alleged to have been committed, the People have avoided giving any specification, on the plea that it would besmirch the records of the court to do so.

That makes it all the more necessary that an examination of the minutes be had.

The indictment alleges simply that the play is obscene. This is a hardship upon the defendants, for they cannot tell whether the whole of the play or only portions of it will be relied upon as obscene. If the words complained of were set out in the indictment, they would know what charge they are called upon to meet.

POINT I

THE FAILURE TO ALLEGE THE SPECIFIC PARTS OF THE PLAY WHICH ARE CLAIMED TO BE OBSCENE AND TO DEAL WITH SEX DEGENERACY AND SEX PERVERSION AND TO CONSTITUTE A NUISANCE, IS A GROUND FOR THE GRANTING OF THIS MOTION.

The Code of Criminal Procedure provides at Section 275, that the indictment must contain:

"* * * * *

2. A plain and concise statement of the act constituting the crime, without unnecessary repetition."

This means that the indictment must not only charge the crime claimed to have been committed, but must set forth the act constituting such crime, and the omission of one or the other is fatal to its validity.

People v. Knapp, 147 App. Div. at p. 446.

In People v. Helmer, 154 N. Y. at p. 600, the court said:

> "The purpose of an indictment is to identify the charge against the defendant, so that his conviction or acquittal may enure to his subsequent protection, and to apprise him of the nature and character of the offense charged and of the facts which may be proved, so as to enable him to prove his defense."

An indictment must fairly apprise the defendant of the facts to be proved against him.

People v. Helmer, 154 N. Y. at p. 601.

Section 284 of the Code of Criminal Procedure provides as follows:

> "§ 284. Indictment when sufficient.
>
> The indictment is sufficient, if it can be understood therefrom

" * * * * * *

6. That the act or omission, charged as the crime, is plainly and concisely set forth;

7. That the act or omission, charged as the crime, is stated with such a degree of certainty, as to enable the court to pronounce judgment, upon a conviction, according to the right of the case."

Subsections 6 and 7 of that Section are particularly important because they define the duty of the People and the extent to which a defendant may be safeguarded and apprised of the crime with which he is charged.

An indictment for publishing an obscene book which did not set forth the words alleged to be obscene, was declared to be bad.

Bradlaugh v. The Queen, L. R. 1877-1878.
3 Q. B. D. 607.

As to the charge of the indictment, Lord Justice Brett said, at p. 637:

> "It is said the defendants did 'print, publish, sell, and utter, a certain indecent, lewd, filthy, bawdy, and obscene book called the "Fruits of Philosophy." It is obvious that the title of the book, It is obvious that the title of the book, 'Fruits of Philosophy,' was not enough to be relied on. Words cannot be more innocent - they never were or could be relied upon as the obscene libel charged. That which was to be relied upon was something written in the book which was so called, and there is no description of anything contained in that book. What is contained in that book, is not even attempted to be described according to its tenor and effect. There is a total omission of the contents, and yet it was the contents, or some part of the contents, which was to be relied on by the Crown. The words complained of are necessary to the averment in the indictment, and the total omission of them cannot be cured by the verdict."

In that case Lord Justice Bramwell, at p. 618, after reviewing a number of English cases, approved of the criticism to the indictment made by the plaintiff in error

"that the book, as a whole, was charged as an offence against her, and she could not possibly tell what passages would be selected as those on which the charge was to be supported."

As to this he pointed out that the rights of a defendant are seriously prejudiced by not setting forth in the indictment the alleged obscene matter because "a defendant is entitled to take the opinion of the Court before which he is indicted by demurrer".

And after reviewing the cases, holding that the indictment to be good, the obscene matter must be set forth, he said at p. 619:

> "That being the general principle, we must deal with the argument that obscene libels need not be, and indeed ought not to be, set forth on the record; the reason given being that the records of the court should not be defiled by any indecency of that kind. Speaking with the greatest respect to those who have thought otherwise, I think the objection fanciful and imaginary. The records of a court of justice are not read with a view to entertainment or amusement; and if the objection has any weight, why does it not apply to other libels, and to other offences? I suppose the majority of mankind would think much worse of a blasphemous libel than even of an obscene libel, and would consider it much more objectionable that the terms of the former should be perpetuated than those of the latter. I suppose excellent reasons could be given why seditious language, possibly alluding disrespectfully to the Sovereign, should not be perpetuated on the court rolls. But there is another kind of libels, which, to my mind, if it were possible, ought to be effaced from the rolls, and yet it is admitted that they must be set out on the record - I mean libels defaming the character of a private person. Let us see which is the worst in its consequences. Suppose a man indicted for a libel charging an infamous crime against another. It must be set out upon the record, for it is a defamatory libel. Then the defendant may never plead, or may not be arrested, or he may die, and thus the charge may never be tried, and yet that statement is to remain on the record for all time, and no answer will be given to it."

He points out that the American rule is the same as the English rule (p. 621); that the indictment must set

forth the obscene words unless there is an allegation that the libel was so obscene that it could not be with decency and propriety put upon the record. He said:

> "The rule in the American courts appears to be that when there is no allegation excusing the statement of the words on the record, on the ground of what may be called their infamy, they must be set out." (p. 621)

The rule requiring the obscene matter to be set forth in the indictment prevails in the United States. As to that rule, Lord Justice Brett said at p. 638:

> "A rule of practice seems to exist in the United States of America, that when an indictment contains an averment that the words are so obscene that if set out they would pollute the records of the Court, it is unnecessary to set them forth; but that where there is not this averment, the words must be set out, and if there is an omission both of the words and of the averment, the indictment is bad in arrest of judgment. Therefore the American cases, if they are to be regarded as authorities, are against the prosecution, and in favour of the plaintiffs in error in this case; because, besides the omission of the words, there is also the omission of that averment which is a necessary substitute for them. I confess, however, that I know of no authority saying that any similar rule exists in English law. I have read Lord Holt's view, as expressed in Rex v. Sparling (1), that the words of a blasphemous libel must be set out, however shocking they may be, and it seems to me, to say the least of it, a more robust rule to set out the obscene words upon the face of the indictment than to attempt to preserve the purity of the records, when the ears of every one in Court must be polluted by the words being read out before the judge and jury. I cannot follow the reasoning as to the advisability of the records of the Court being kept pure. It seems to me that it is a reason which does not bear examination, at all events, the principle that obscene words may be omitted if they are so obscene that they would pollute the records of the Court, is not the law of England, and if it were it does not apply to this case, as the indictment does not contain an averment that the words are too obscene to be inserted. Therefore, to my mind, this indictment is bad, and the plaintiffs in error are entitled to judgment. They are entitled to judgment, as all persons charged with crime in England are, for want of sufficient accuracy in the instrument by which they are charged."

The American rule has been severely criticised by Lord Justice Cotton, at p. 641 in these words:

> "It is perfectly true that the English courts do require their records to be kept pure in this sense, that they will not allow their records to be the means of propagating defamation or obscenity under the pretence of its being part of a judicial proceeding. They will require anything impure or scandalous to be removed from their records when it is irrelevant to the matter to be tried, but if the matters on the records of the Court or in an affidavit are really relevant to the matter to be tried, they are not scandalous, and no principle recognised by the English courts requires any statement to be removed from their records, if relevant to the issue to be tried, simply because it is impure. Does the principle that the records must be kept pure justify the absence of what would otherwise be a necessary averment in the indictment, on the ground that it is gross and impure? In my opinion it does not, and for this reason, the duty of the Court is to administer justice, either as between party and party, or as between the Crown and those who are accused; and for the purpose of doing so it ought not to consider its records as defiled by the introduction upon them of any matter, which is necessary in order to enable the Court to do justice according to the rules laid down for its guidance; a defendant has a right to say that he shall have fair notice, in order that he may not be prejudiced in defending himself against proceedings, whether civil or criminal, and therefore, in my opinion, the principle upon which those American cases are decided does not avail in this case. Those cases can be no guide or assistance to us. If it is desirable that in cases of this sort there should be an exception to the rule as to the statement of words, it is not the duty of the Court to make an exception; it must be for parliament to interfere, as it has done in other cases mentioned by Lord Justice Brett."

It has become the prevailing practice in the preparation of criminal indictments to excuse a statement of the alleged obscene matter by a reliance upon the principle of pollution of the court records. It serves as a convenient piece of camouflage or smoke-screen for a groundless prosecution. It subjects the defendant to the ordeal of a trial without an opportunity to apprise himself of the charge

against him, of the words claimed or the matter alleged to be obscene, to properly defend himself and to fairly meet the charge, and above all it deprives him of the right to demur to the indictment.

It becomes therefore important in the interests of justice that in a case where the People avail themselves of this privilege, that the defendants should be given a fair opportunity to meet the situation by the furnishing to them of a copy of the minutes of the Grand Jury.

It is not necessary to a defective indictment to say that the defendant may obtain a bill of particulars. In the first place, a bill of particulars is discretionary. It may or may not be granted, within the discretion of the court. In the second place, an application for a bill of particulars might be met with the argument that the furnishing of a bill of particulars would likewise offend the dignity of the court and besmirch its records.

In the case of People v. Corbalis, 178 N. Y. 516, the late Chief Justice Parker, sustaining a demurrer to an indictment, and quoting from an earlier opinion by Judge Danforth in People v. Dumar (106 N. Y. 502), said at p. 520:

> "* * * for the manifest intention of the legislature in requiring the indictment to state the act constituting the crime was, among other things, <u>that the accused should learn from it what he was called upon to defend.</u>"

And at p. 522, the court said:

> "The learned judge who wrote the opinion of the Appellate Division appreciated the force of the argument of defendants that it is impossible under such an indictment for the accused to properly prepare for trial, but he suggested that defendants could be relieved from this embarrassment by making a motion for a bill of particulars. The difficulty with that remedy is that whether a bill of particulars shall be granted or not rests in the discretion of the court. A motion may be

made, it is true; but it need not be granted. Hence it is the duty of the courts to see to it that the right which the legislature has accorded to a citizen accused of crime to have the indictment state the acts constituting the crime so that he may prepare his defense, and be protected against further prosecution, be not fritted away by holding that the requirement of the statute will not be insisted upon, and that upon defendant will be placed the burden of ascertaining, if he can, by a motion for a bill of particulars, addressed to the discretion of the court, what particular act or acts the People claim make out the crime charged."

In a more recent case, People v. Williams, 243 N. Y. 162, Judge McLaughlin said at p. 165:

"The purpose of an indictment is to identify the charge against a defendant so that his conviction or acquittal may prevent a subsequent charge for the same offense and also to notify him of the nature and character of the crime charged against him to the end that he may prepare a defense."

In People v. Helmer, 154 N. Y. at p. 600, the indictment was held sufficient, but the court laid down the following rule:

"Under the present practice, an indictment is sufficient if the act or omission, charged as a crime, is plainly and concisely set forth with such a degree of certainty as to enable the court to pronounce judgment according to the right of the case, and no indictment is insufficient by reason of any imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant, upon the merits. Nor does any error or mistake therein render it invalid, unless it actually prejudices or tends to prejudice the defendant in respect to a substantial right. (Code Criminal Procedure, Sec. 284, 285, 684). The purpose of an indictment is to identify the charge against a defendant, so that his conviction or acquittal may inure to his subsequent protection, and to apprise him of the nature and character of the offense charged and of the facts which may be proved, so as to enable him to prepare his defense. When tested by these principles it is obvious that the indictment was sufficient, as there was no defect which affected any substantial right of the defendant. It fairly apprised him of the facts to be proved against him, and so clearly identified the crime charged that a judgment would protect him from a subsequent conviction. Hence, we are of

the opinion that the defendant's exception to this ruling was not well taken."

So that it is manifest that there are two objects aimed to be secured by this statute: (1) to guard against the possibility of a second prosecution for the same offense; (2) to inform the defendant of the facts in order that he may prepare his defense.

People v. Peckens, 153 N. Y. 576, 588.
People v. Helmer, 154 N. Y. 596, 600.
People v. Willis, 158 N. Y. 392, 396.
People v. Klipfel, 160 N. Y. 371, 374.
People v. Kane, 161 N. Y. 380, 386.
People v. Corbalis, 178 N. Y. 516, 520.

In Pettibone v. United States (148 U. S. 197, 202,) the court said:

"The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication."

An indictment, although following the language of the statute, must contain a statement of the particular acts of facts which go to constitute the crime in the given instance. Statutes are generic. The indictment must be specific; it must identify the crime.

Wharton (1 Crim. Pr. (10th Ed.) Sec. 269) says:

"* * * On the general principles of common law pleading, it may be said that it is sufficient to frame the indictment in the words of the statute, in all cases where the statute so far individualates the offense that the offender has proper notice, from the mere adoption of the statutory terms, what the offense he is to be tried for really is. But in no other case is it sufficient to follow the words of the statute. It is no more allowable, under a statuory charge, to put the defendant upon trial without specification of the offense, than it would be under a common law charge."

In United States v. Carll (105 U. S. 611, 612),

it is said:

"In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished."

In the well-known case of United States v. Cruikshank (92 U. S. 542, 558), the court said:

"It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species, - it must descend to particulars'."

In Armour Packing Co. v. United States (209 U. S. 56, 83), the court said:

"It is not always sufficient to charge statutory offenses in the language of the statutes, and where the offense includes generic terms it is not sufficient that the indictment charge the offense in the same generic terms, but it must state the particulars."

In Farrell v. State (111 Ark. 180, 196), the court said:

"An indictment for committing a statutory offense may describe the offense in the general language of the statute, but the description must be accompanied by a statement of the particulars essential to constitute the crime charged, and must acquaint the accused with what he must meet upon the trial."

In short, the crime must be "identified". The specific acts which in the given instance go to constitute it must be stated. For example:

The statute makes it an offense to steal "personal property." - An indictment, to be good, would have to specify the particular property. "The subject of the act must be more specifically averred, because the words of the definition are generic, and the subject of the larceny is of a species" (Phelps v. People, 72 N. Y. 334, 350).

The statute makes it a crime for one to obtain

money or property "by color or aid of fraudulent or false representations or pretense." - An indictment, to be good, would have to "show what the false pretenses were, and state them with reasonable certainty and precision" (People v. Blanchard, 90 N. Y. 314, 319).

Wharton (1 Crim. Pro. (10th Ed) Sec. 196, 270) collects many illustrations of this necessity for specification. He says:

> "Sec. 196. As the indictment must contain a specific description of the offense, it is not enough to state a mere conclusion of law. * * * In an indictment for obtaining money by false pretenses, it will not suffice merely to state that the defendant falsely pretended certain allegations, but it must also be stated by express averment what parts of the representations were false, for otherwise the defendant will not know to what circumstances the charge of falsehood is intended to apply. * * * An indictment, on the same principle, charging a man with being a common cheat, or a common swindler or defrauder, is bad, and is not helped by an averment that, by divers false pretenses and false tokens, he deceived and defrauded divers good citizens of the said State. A count, also, in an indictment charging that the defendant sold a lottery ticket, and tickets, in a lottery not authorized by the laws of the Commonwealth, is bad, not being sufficiently certain; and so of an indictment for embezzlement charing unlawful loaning of State money, without stating how or to whom, is bad; and so of a count charging the defendant with voting without having the legal qualifications of a voter; and so of a charge that election officers 'did commit wilfull frauds in discharge of duties' is insufficient without setting out the particular acts; and so of a count which charges the defendant with unlawfully and frudulently adulterating 'a certain substance intended for food, to wit, one pound of confectionery'; and so an indictment under statute for defrauding a hotel-keeper is insufficient, unless the nature and character of the acts and circumstances indicative of fraudulent intent are fully set forth; and so an indictment for defrauding by means of divers false and fraudulent tokens, devices, pretenses and representations, must make specific allegations as to the tokens, devices, pretenses and representations, or it will be insufficient."

* *

"§ 270. * * * It is made indictable, for instance to obtain goods by falsely 'personating' another. But no one would maintain that it is enough to charge the defendant with 'falsely personating another.' So far from this being the case, the indictment would not be good unless it stated the kind of personation, and the person on whom the personation took effect. An act of Congress, to take another illustration, makes it indictable to 'make a revolt,' but under this act it has been held necessary to specify what the revolt is. * * *

'Not a qualified voter', in a statute, must be expanded in the indictment by showing in what the disqualification consists. And 'the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution against him. An indictment not so framed is defective, although it may follow the language of the statute.'"

Other examples will be found in:

People v. Winner, 80 Hun 130.

People v. Tatum, 60 Misc. 311, 313-314.

People v. Richardson, 64 Misc. 684.

People v. Burns, 53 Hun 274.

People ex rel Maher v. Potter, 112 N. Y. Supp. 298.

United States v. P. & O. T. Co., 153 Fed. Rep. 997, 1003.

In the Winner case (supra), it is pointed out that an offense consists of "certain acts done" or omitted by a defendant, and it is of those acts that specification must be made.

As the indictment now stands, the defendants may

be convicted of having participated in a presentation of any one of the three acts of the play, and they may be subsequently indicted and convicted for having participated in the other two acts of the play.

This is particularly true in view of the fact that the indictment itself alleges that the defendants participated in "obscene, indecent, immoral, impure scenes, tableaux, incidents, parts and portions of said obscene, indecent, immoral and impure drama, play and exhibition * * * (first count) and "certain scenes and tableaux in said exhibition, show and entertainment, all then and there depicting and dealing with the subject of sex degeneracy and sex perversion" (second count).

Moreover, the defendants are not informed by this indictment of the exact nature of their crime, and this court on reading the indictment will be unable to ascertain with any degree of certainty just what these defendants are alleged to have done.

This court could not under the present indictment pronounce judgment upon a conviction which judgment would bar a subsequent judgment on a conviction for the same offense.

It is manifest that the courts have been zealous in so construing these sections of the Code of Civil Procedure, that the rights of defendants will not be jeopardized and that defendants will have an opportunity to prepare themselves and to defend themselves.

The long line of decisions quoted at length herein

indicates a definite policy on the part of the courts as well as on the part of the legislatures. That policy cannot be lightly dismissed by the People on the pretext that the records of the court may be besmirched or the dignity of the court offended if obscene matter be placed upon the records.

The English courts have been as zealous as the American Courts to keep their records clean, and the legislative branch of the English Government, in enacting statutes to enable that to be done, have been careful at the same time to preserve the rights of defendants against oppressive and tyrannical construction.

Attention is called to the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64) s. 7:

> "It shall not be necessary to set out in any indictment or other judicial proceeding instituted against the publisher of any obscene libel the obscene passages, but it shall be sufficient to deposit the book, newspaper, or other documents containing the alleged libel with the indictment or other judicial proceeding, <u>together with particulars shewing precisely by reference to pages, columns, and lines in what part of the book, newspaper, or other document the alleged libel is to be found, and such particulars shall be deemed to form part of the record</u>, and all proceedings may be taken thereon as though the passages complained of had been set out in the indictment or judicial proceeding."

That statute requires that the People, on depositing the obscene work, indicate exactly what parts of the work are deemed to be obscene and indecent, and the entire work must then be deposited with the court, together with the indictment.

To charge that a thing is obscene, indecent, immoral or impure, is but a mere generality - a conclusion - and in the absence of particulars showing precisely the exact

language used, makes out no offense.

The same observation applies to a charge that a play deals with the subject of sex degeneracy or sex perversion. That also is a mere generality and in the absence of particulars showing precisely by reference to the language used, no crime is spelled out; and precisely the same objection applies to a count of an indictment charging a defendant with maintaining a public nuisance in that he gave an indecent or obscene show and/or a show dealing with the subject of sex degeneracy or sex perversion.

Exhaustive research has disclosed no Court of Appeals decision in this state which excuses the People from specifically setting out in an indictment the obscene matter charged in the crime.

There is, however, ample authority that obscene matter must be set out under our statutory form of indictment.

In People v. Danihy, 63 Hun. 579, the defendant was charged with having published obscene matter in his newspaper.

The indictment set out that the matter published was obscene, lewd, lascivious, filthy and indecent.

The court held that this was not sufficient, and that the alleged obscene contents should have been set out in detail.

Presiding Justice Dwight said at p. 581:

> "The objection to this court, that it does not set out the contents of the newspaper complained of, nor any portion of them, is, we think, well taken. It is a cardinal principle of pleading, in both civil and criminal actions, that the complaint (indictment) shall contain a statement,

not merely of the charge sought to be established, but of facts which, if taken to be true, support the charge. The pleading must show on its face - its truth being conceded - that the cause of action exists, or the crime has been committed. It is not enough to allege a conclusion of fact; the facts themselves must be alleged from which the conclusion may be drawn; and in a case like the present it is not enough to characterize the publication complained of, but the contents of the publication must be set forth in order that it may appear on the face of the pleading that it is of the character charged.

The rule which has always held in actions of libel, either civil or criminal, is applicable to this case. A complaint or indictment which only charged that the written or printed matter complained of was libelous or defamatory would certainly be had, not because of a failure to identify the matter, but because it did not appear on the face of the pleading that it was libelous or defamatory. And so the two classes of actions or prosecutions have always been classed together for the purposes of this rule; and it has been held, with great strictness, that in all actions, civil and criminal, in which the cause of action or offense consists in the publication of written or printed matter, the words complained of must be set out in the complaint or indictment."

That case has never been overruled, and has since been cited with approval in a number of cases.

McNamara v. Goldan, 118 App. Div. 221.

People v. Kaufman, 14 App. Div. 305.

In the Kaufman case Judge Barrett, while recognizing the doctrine of People v. Danihy, stated nevertheless that it was the well-settled American rule that it was not necessary to set out obscene matter in the indictment, when the claim was made that such matter would pollute the court records; but Judge Barrett also recognized that great injustice might follow a too literal interpretation of that rule, and he said at pl 308 (14 App. Div.):

"If anything more is requisite for the protection of the defendant's rights it may well be left to the discretion of the court to compel

the public prosecutor to furnish such further information or specification as may be needful."

The statute and the rule are clearly defined, to wit, that the indictment must be specific and that it must state the facts and print in full all matters charged to be obscene.

The apparent exception to the rule which would relieve the People from setting forth the obscene matter only when such claim is made in the indictment, does not destroy the statute and the rule. It is at most an exception which has for its ultimate aim the dignity of the court and the purity of its records; but even in such case the courts do not lose sight of the fact that a defendant is entitled to be protected, and that there are certain safeguards thrown about him.

The courts will, therefore, avail themselves of the exception insofar as it will protect their records, but they will not permit the exception to work a hardship and an injustice upon a defendant under the cloak of the exception.

Indeed, the existence of the exception should be the most cogent reason for granting the motion to inspect the minutes of the Grand Jury.

To indict fifty-seven defendants on three counts and to fail to state a single obscene passage in the play, is not a fair and reasonable exercise of the prerogative of the people under the exception - it is unfair and tyrannical.

The exception is no longer a shield, but has become a sword in the hands of the prosecution.

Moreover, the granting of this motion to inspect would not destroy the purpose of the exception, nor would it besmirch the records of the court.

An inspection would apprise the defendants of the crime, and at the same time keep clean the records of the court.

As long as the records of the court will not be besmirched, the defendants become entitled to the original safeguards under the rule; that is to say, under the statute and under the authorities. These rights and safeguards will be satisfied by an inspection of the minutes of the Grand Jury.

POINT II

A MOTION FOR THE INSPECTION OF THE MINUTES OF THE GRAND JURY IS PROPER IN SUPPORT OF A MOTION TO DISMISS AN INDICTMENT WHICH IS FOUNDED UPON INCOMPETENT, ILLEGAL AND INSUFFICIENT EVIDENCE.

People v. Molineaux, 27 Misc. 60.

People v. Wood, 93 Misc. 701.

People v. Walsh, 92 Misc. 573.

People v. Moskowitz, 119 Misc. 837.

The indictment charges in the first count that the defendants did unlawfully "prepare, advertise, give, present and participate in an obscene, indecent and immoral drama, play, exhibition", etc., parts and portions of which were alleged to be obscene, indecent, immoral and impure.

In the second count the same performance is alleged to have depicted and dealt with "the subject of sex degeneracy and sex perversion".

The third count charges two nuisances; one, in keeping and maintaining a theatre and playhouse; secondly, in presenting, exhibiting and displaying the exhibition, show and entertainment mentioned in the previous two counts.

Obviously it would require different evidence to show the four acts alleged in the indictment to be unlawful.

It is believed that there was no evidence presented to the Grand Jury to show that the particular actors mentioned in the indictment (constituting the whole cast) took part in the particular parts of the play which are alleged in the indictment to be obscene and indecent.

As shown above, there is not even a specification of such parts so that it may be shown what actors participated in the presentation thereof.

It is further believed that there was no competent evidence before the Grand Jury to show that any of the actors or the author mentioned in the indictment took any part in the maintenance of the nuisances alleged in the third count, nor that they had any part in "keeping" the Biltmore Theatre, which is alleged to have constituted a nuisance.

In People v. Foody, 38 Misc. 357, it was held that the mere failure to grant a preliminary examination was ground for granting a motion to inspect the minutes.

Although some cases have held that this alone is not sufficient for the granting of such a motion, the language of Foster, J., is very significant in pointing out the necessity for protecting the accused in the manner requisite by the defendants herein:

> "I take it the chief reason for the secrecy of the proceedings of the grand jury is that those who are groundlessly accused may not be unnecessarily humiliated by a publication of the ex parte charges made and evidence received against them." (p. 358).

See to the same effect:

People v. Molineaux, 27 Misc. 60.

In People v. Klaw, 53 Misc. 158, a motion to inspect the minutes of the Grand Jury was granted, in order to enable the defendant to prepare his defense, where it appeared that the defendants had not been furnished with a copy of the indictment, and where there had been no preliminary examination. Crain, J., said at p. 160:

"A motion to set aside an indictment may be made * * * upon the ground that the defendant's constitutional rights have been invaded, as by finding an indictment without evidence, or wholly upon incompetent and illegal testimony."

And again at p. 162:

"In 1885 provision was made for the taking of the testimony before the grand jury by a stenographer appointed in the county of New York by the district attorney, and this stenographer was required to furnish to the district attorney a copy of the minutes. This legislation resulted in more fully arming the district attorney at the threshold of the prosecution for its successful maintenance. If justice is to be done the tendency of the courts must be to enlarge the privileges of a defendant pari passu with the growth of the power of the district attorney."

In People v. Walsh, 92 Misc. 573, the Grand Jury considered not only the sworn statement of witnesses, but also newspaper accounts and private communications. Marcus, J., upon a motion to inspect the minutes, went beyond the request of counsel and dismissed the indictment.

In People v. Moskowitz, 119 Misc. 837, the official stenographer at a John Doe inquiry was subsequently permitted to testify before the Grand Jury. Upon the probability that such evidence was incompetent, the court refused to indulge the presumption that indictments are found upon competent testimony, and granted the motion to inspect the minutes, so that information as to the actual testimony could be accurately supplied. In an able opinion by McLaughlin, J., the reasons for granting the motion to inspect the minutes of the Grand Jury are very aptly summarized:

"The Code of Criminal Procedure provides that the grand jury may hear none but legal evidence, such as is given by witnesses produced and sworn before them, or furnished by legal or documentary evidence, or a proper deposition of a witness. * * * The motion to inspect the minutes of the grand jury is

made for the purpose of enabling the defendant to make a motion to dismiss the indictment made upon the grounds established by the Court of Appeals in People v. Glen, 173 N. Y. 395; People v. Sexton, 187 id. 495, namely, that the evidence received by the grand jury was insufficient to support the indictment or that illegal evidence is the sole basis for the indictment. Here as there the moving papers and 'John Doe' minutes show to the court so far as is possible without an inspection of the grand jury minutes, what the testimony of the witnesses was, or as the defendant contends, must have been before the grand jury. * * * (p. 842)

The question of whether accomplice testimony was before the grand jury is not before me to decide. Judge Wadhams further says, in the Wood Case, supra, at page 707: 'The precise question presented upon a motion to dismiss is whether the evidence before the grand jury was sufficient to warrant a conviction of the defendant by a trial jury. That question can be determined only after an inspection. It is sufficient to hold that by the affidavits presented the defendant has shown cause, under the established rule, for the granting of the motion to inspect the minutes.' * * *

In the event of the minutes showing insufficient legal testimony, or that the indictment rests solely upon incompetent testimony, the defendant's constitutional rights have been invaded within the meaning of section 313 of the Code of Criminal Procedure. Matter of Montgomery, 126 App. Div. 72; People v. Jakeway, 88 Misc. Rep. 124; People v. Klaw, 53 id. 158." (p. 844).

The above cases conclusively establish that where to the best of the accused's information and belief no sufficient legal evidence is introduced properly to connect him with the crime charged, a motion to inspect the minutes will be granted as an aid to the accused in determining whether or not there was such an insufficiency of evidence as to compel a court to quash the indictment.

POINT III.

THE METHOD BY WHICH THE INDICTMENT WAS OBTAINED, THAT IS TO SAY, THE INTRODUCTION OF INCOMPETENT EVIDENCE, WARRANTS THE GRANTING OF THIS MOTION.

The moving papers charge that the indictment was obtained in two ways: (1) by calling witnesses who testified with respect to their interpretation and construction of the meaning of certain lines in the play; (2) by calling witnesses who testified that certain lines in the play had been deleted, so that the deletion gave grounds for the belief that the lines must have been obscene and impure.

Such evidence was clearly incompetent, because it did not establish as a matter of law that the lines of the play were obscene or impure.

The best test of obscenity in this case is the lines of the play. The meaning and the lines of the play, read in conjunction with scenes and situations in which they occur, are to be determined by the construction which the average citizen puts upon them.

The court will consider how an audience of average intelligence, viewing the play and hearing the lines spoken, would receive these lines.

The court is not concerned with any secondary meaning which may be imputed to the lines of the play by police officers, nor is it concerned with the opinions or deductions of police officers or with any special technical meaning which police officers may attribute to such lines.

Judge Wagner, in People v. Seltzer, 122 Misc. 329, had before him a demurrer to an indictment charging the

publication of an obscene book under Section 1141 of the Penal Law. He said at p. 333:

> "The important but not sole test, as approved in the Muller case, supra, taken from the case of Regina v. Hicklin, L. R. 3 Q. B. 369, is one that I think should in part guide the law-enforcing authority and a court and jury in determining whether a book offends the law against obscene publications, namely: 'Is the tendency of the matter charged as obscene to deprave or corrupt those whose minds are open to such immoral influences and who might come in contact with it?' keeping in full view the consideration that the statute looks to the protection not of the mature and intelligent, with minds strengthened to withstand the influences of the prohibited date, but of the young and immature, the ignorant and sensually inclined."

Moreover, he held that he would not consider the comments by literary critics upon the work.

In that respect he followed the rule laid down in the leading case in this state in People v. Muller, 96 N. Y. 408. In that case the defendant was charged with selling indecent and obscene photographs. Judge Andrews considered the proof offered on the trial. He said at p. 410:

> "It does not require an expert in art or literature to determine whether a picture is <u>obscene or whether printed words are offensive to decency and good morals</u>. These are matters which fall within the range of ordinary intelligence, and a jury does not require to be informed by an expert before pronouncing upon them."

And at p. 411 and 412 he discussed the merit of evidence of witnesses with respect to the obscenity of the work:

> "The defendant on the trial called as witnesses an artist who had practiced painting for many years, and also a person who had been engaged in the study of art. They were asked by defendant's counsel whether there was a distinguishing line, as understood by artists, between pure art and obscene and indecent art. The question was objected to by the prosecutor and excluded by the court. The issue to be tried was whether the particular photographs in question were obscene or indecent. The defendant was entitled to prove in his defense any facts legit-

imately bearing upon this issue. The fact that the original pictures of which the photographs were copies had been exhibited in the Salon in Paris was admitted by the prosecution, and it was proved that one of them had been publicly exhibited in Philadelphia. But this did not, as matter of law, exclude a finding by the jury that the photographs were obscene and indecent. It is not impossible certainly that the public exhibition of indecent pictures may have been permitted in Paris or Philadelphia, and the fact that a picture had been publicly exhibited would not necessarily determine its character as decent or indecent. Indeed there is but little scope for proof bearing upon the issue of decency or obscenity, beyond the evidence furnished by the picture itself. The question which was excluded, if intended to bring out the fact that pictures might be either decent or indecent, and that the canons of pure art would accept those of one class and reject those of the other, was properly overruled as an attempt to prove a self-evident proposition. If the question was intended to be followed by proof that, according to the standard of judgment adopted and recognized by artists, the photographs in question were not obscene or indecent, it was properly rejected for the reason that the issue was not whether in the opinion of witnesses, or of a class of people, the photographs were indecent or obscene, but whether they were so in fact, and upon this issue witnesses could neither be permitted to give their own opinions, or to state the aggregate opinion of a particular class or part of the community. To permit such evidence would put the witness in the place of the jury, and the latter would have no function to discharge. The testimony of experts is not admissible upon matters of judgment within the knowledge and experience of ordinary jurymen (1 Greenl. Ev., Sec. 440). The question whether a picture or writing is obscene is one of the plainest that can be presented to a jury, and under the guidance of a discreet judge there is little danger of their reaching a wrong conclusion. <u>The opinions of witnesses would not aid the jury in reaching a conclusion, and their admission would contravene the general rule that facts and not opinions are to be given in evidence</u>."

In Reg. v. Thomson (1900, 64 J. P. 456, the court said at p. 457:

> "* * *It is a book of a lewd and lascivious character manifestly calculated to corrupt the public morals? We do not require the help of critics, or of antiquarian research, to help us to decide the above questions."

In People v. Brainard, 192 App. Div. 816, Mr. Justice Dowling, in a very able dissenting opinion, said at p. 823:

> "The test as to what is an obscene publication is: 'Whether the tendency of the matter charged as obscenity is to deprave or corrupt those whose minds are open to such immoral influences and who might come into contact with it.' (People v. Muller, 96 N. Y. 408, 411; Regina v. Hicklin, L. R. 3 Q. B. 360; 11 Cox C. C. 19.) 'What is the judgment of the aggregate sense of the community reached by it? What is its probable, reasonable effect on the sense of decency, purity and chastity of society, extending to the family, made up of men and women, young boys and girls - the family, which is the common nursery of mankind, the foundation rock upon which the State reposes?' (United States v. Harmon, 45 Fed. Rep. 414; revd. on other grounds, 50 id. 921.) As was said by Cockburn, Ch. J. (11 Cox C. C. 19), the test of obscenity is whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands the publication may fall."

To ascertain whether or not the lines of a play are obscene and impure, one does not have to resort to mental jugglery. The general rule with respect to the construction and meaning of words, whether in statutes or contracts, applies with equal force to the words of a play or book.

So, in the case of Joring v. Harriss, 292 Fed. 974, the late Judge Hough said at p. 978:

> "Therefore it is conclusively presumed that the parties meant what the words which they used mean, and no oral evidence was permissible. What they meant, and all that they meant, must be spelled out of the plain words they wrote."

In the Code of Criminal Procedure we have Section 282 which provides as follows:

"Sec. 282. Construction of words used in an indictment.

"The words used in an indictment must be constructed in their usual acceptation, in common language, except words and phrases defined by law, which are to be construed according to their legal meaning."

If the People had incorporated in the body of the indictment the specific passages of the play which they deemed indecent or impure, the court, in considering those passages, would be bound to follow the rule laid down in Section 282, because they would be part of the indictment.

The fact that the People have pleaded the exception and have refused to incorporate such passages in the indictment does not mean that any different rule of construction applies to such passages or lines; and the court may, after the inspection of the minutes of the Grand Jury, construe such passages and lines in the same way that it would have construed them had they been part of the indictment originally.

It is the claim of the defendants that if this motion is granted and an inspection of the minutes had, the language of the play and all of its lines will prove to be utterly harmless and innocent and capable of no other construction.

It is, therefore, necessary that such an inspection be had so that the court may apply to the lines of this play a proper construction in accordance with Section 282 of the Code of Criminal Procedure, and not the construction given to the lines by police officers.

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CONCLUSION.

THE MOTION SHOULD BE GRANTED.

Respectfully submitted,

NATHAN BURKAN,

Attorney for Defendants
other than Davenport.

entered in the office

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New York City

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COURT OF GENERAL SESSIONS OF
THE COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK

-against-

MAE WEST, et al,

Defendants.

DEFENDANTS' MEMORANDUM ON MOTION TO INSPECT MINUTES OF THE GRAND JURY

NATHAN BURKAN

Attorney for Defts. other than Davenport

(Office and Post Office Address)
1451 BROADWAY
Borough of Manhattan New York City

To Esq ..

Attorney for

Service of a copy of the within

is hereby admitted.

Dated, N. Y., 192

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at No. N. Y., that being the

address within the state designated by h for that purpose upon the preceding papers in this

action, or the place where h then kept an office, between which places there then was and

now is a regular communication by mail.

Sworn to before me, this
day of 192

COURT OF GENERAL SESSIONS OF THE

COUNTY OF NEW YORK.

* * * * * * * * * * * * * * * * * * * *

THE PEOPLE OF THE STATE OF NEW YORK

-against-

*

MAE WEST, et als,

Defendants.

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DEFENDANTS' MEMORANDUM ON MOTION TO DISMISS THE INDICTMENT

This is a motion under Section 331 of the Code of Criminal Procedure, to dismiss the indictment upon the ground that it does not state facts sufficient to constitute a crime.

There are fifty-seven defendants named in the superseding indictment (hereinafter referred to as "the indictment".)

The indictment contains three counts, which, briefly, are as follows:

FIRST COUNT: The defendants are accused of the crime of unlawfully preparing, giving, directing, presenting and participating in an obscene, indecent, immoral and impure drama, play, exhibition, show and entertainment, and of unlawfully aiding and abetting such acts.

SECOND COUNT: The defendants are accused of unlawfully preparing, advertising, giving, directing, presenting and participating in an immoral play and exhibition, and certain scenes and parts thereof dealing with sex degeneracy and sex perversion, and of aiding and abetting in such acts.

THIRD COUNT: The defendants are accused of maintaining a public nuisance.

The first two counts are based upon Section 1140a of the Penal Law. That section provides as follows:

"§ 1140a. Immoral plays and exhibitions and the use and leasing of real property therefor.

"1. Any person who as owner, manager, producer, director, actor or agent or in any other capacity, prepares, advertises, gives, directs, presents or participates in, any obscene, indecent, immoral or impure drama, play, exhibition, show or entertainment or any obscene, indecent, immoral, impure scene, tableau, incident, part or portion of any drama, play, exhibition, show or entertainment, which would tend to the corruption of the morals of youth or others; or who

"2. Prepares, advertises, gives, directs, presents or participates in, any drama, play, exhibition, show, entertainment, scene, or tableau depicting or dealing with, the subject of sex degeneracy, or sex perversion; and

"3. Every person aiding or abetting any such act, and every owner, lessee, or manager of any theatre, garden, building, room, place or structure, who leases or lets the same or permits the same to be used for the purposes of any such drama, play, exhibition, show or entertainment, or any such scene, tableau, incident, part or portion of any drama, play, exhibition, show or entertainment, knowingly, or who assents to the use of the same for any such purposes; shall be guilty of a misdemeanor.

"In any case of a conviction for a violation of this section, where the violation occurred upon premises licensed for any public exhibition, drama, play, show or entertainment, the licensing authority shall have power to revoke such license upon proof of such conviction; and upon such revocation such licensing authority shall have power to refuse a new license affecting such premises for a period not exceeding one year from the date of such revocation."

The first count is apparently based upon subdivision 1 of that section, and the second count is apparently based upon subdivision 2.

The third count of the indictment is based upon section 1532 of the Penal Law, which reads as follows:

"§ 1532. Maintaining nuisance.

"A person who commits or maintains a public nuisance, the punishment for which is not specially prescribed, or who wilfully omits or refuses to perform any legal duty relating to the removal of such a public nuisance, is guilty of a misdemeanor."

The indictment fails to specify which parts of the play "Pleasure Man" are claimed to be obscene, indecent, immoral and impure. It fails to specify in which respect this play and its scenes and tableaux depicted and dealt with the subject of sex degeneracy and sex perversion, and it fails to specify in which way the said play was so wicked, lewd, scandalous, bawdy, obscene, indecent, infamous, immoral and impure, that it constituted a common nuisance.

The reason assigned in the indictment for the failure to allege any of the specific details is that "the said scenes, tableaux, incidents, parts and portions thereof would be offensive to this court and improper to be spread upon the records thereof."

Although the statutes of New York provide that an indictment must state specifically the crime which is alleged to have been committed, the People have avoided giving any specification, on the plea that it would besmirch the records of the court to do so.

POINT I.

THE FAILURE TO ALLEGE THE SPECIFIC PARTS OF THE PLAY WHICH ARE CLAIMED TO BE OBSCENE AND TO DEAL WITH SEX DEGENERACY AND SEX PERVERSION AND TO CONSTITUTE A NUISANCE, MAKES THE INDICTMENT FATALLY DEFECTIVE.

In People v. Zambounis, 251 N. Y. 94, the defendant was convicted of printing obscene matter in violation of Section 1141 of the Penal Law.

The information against the defendant in that case stated the act constituting the offense as follows:

> "'The said defendant on the 15th day of January, 1927, and thence continuously to the day of the making and filing of this information, at the city of New York, in the county of New York, with intent to sell and show, unlawfully possessed certain lewd, lascivious, indecent, obscene and disgusting printed matter, whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given, against the form of the statute in such case made and provided, and against the peace of the people of the state of New York and their dignity.'"

It will be noted that this description is almost identical in language with that in the case at Bar.

The Court of Appeals reversed the Appellate Division for the First Department, and held that this indictment was insufficient. Judge Crane said at p. 96:

> "This is insufficient. The name and nature of the publication is not given, neither a description of the printed matter; the dates, even, of the publication of the article are not specified. It is not necessary to set forth in detail the obscene matter, but it is necessary to describe it or identify it with some exactness. The defendant should be informed of the nature of the charge against him and of the act constituting it, not only to enable him to prepare for trial, but also to prevent him from again

being tried for the same offense. On the above information the defendant would have to resort to the testimony or the record of the evidence to show the crime for which he was tried, whereas the indictment or the information alone must be sufficient to show this fact. * * *

"The judgment of conviction must be reversed. Forms and procedure still have their place and purpose in the administration of the law; without them we would have chaos. Much impatience is being shown with the technicalities of the law, and at times it is justified. The requirement that an indictment and an information must state the crime with which a defendant is charged, and the particular acts constituting that crime is more than a technicality; it is a fundamental, a basic principle of justice and fair dealing, as well as a rule of law."

Commonwealth v. McCance 164 Mass. 162 is a case on all fours with the one at bar. The headnote in that case reads:

"An indictment under St. 1890, c. 70, charging the defendant with selling a book containing, among other things, obscene language, must be quashed if it does not specify with reasonably certainty the parts of the book relied on as obscene."

The indictment in that case charged the defendant with selling:

"' * * * a certain book, then and there called 'The Decameron of Boccaccio,' and which said book, upon the title-page thereof, was then and there of the tenor following, that is to say, 'The Decameron; or Ten Days' Entertainment of Boccaccio. A revised translation by W. K. Kelly, with portrait and ten illustrations, drawn and engraved by Leopold Flameng. Published for the Trade,' - and which said book then and there contained, among other things, certain obscene, indecent, and impure language, and manifestly tending to the corruption of the morals of youth, which said book is so lewd, obscene, indecent, and impure that the same would be offensive to the court here and improper to be placed upon the records thereof, wherefore said jurors do not set forth the same in this indictment,' * * * "

The defendant moved to quash the indictment on the ground that:

> "'x x x the indictment sets forth in no legal and sufficient terms wherein said book is amenable to the penalties denounced by the statute; no specifications of any offending passage is (sic) exhibited.'"

The defendant's motion was overruled and the case was tried, resulting in the defendant's conviction.

On appeal, the Supreme Judicial Court of Massachusetts quashed the indictment on the ground that it was not reasonably specific.

Chief Judge Field, in writing the opinion for a unanimous court in the McCance case (supra) held that when this course is adopted by the Grand Jury, "The language complained of should be identified by such a description or reference that it may be known that the indictment was found upon the language which is put in evidence and relied on at the trial." The court said:

> "It remains to be considered whether the present indictment contains a reasonably specific description of the obscene, indecent, and impure language which it is alleged that the book, among other things, contains. The Decameron of Boccaccio was probably not written for the purpose of corrupting the morals of youth. It was written long before the invention of printing, when the number of persons who could read were few, and it is supposed to represent the taste of many cultivated people of the world in Italy

at the time. It was read for the entertainment of men and women. Parts of it are coarse, and according to the standards of modern times are obscene, indecent, and impure, and other parts of it are decent and pure enough to be read by the present generation. Because it is not a book which is wholly obscene, indecent, and impure, the book is described in the indictment as containing, 'among other things, certain obscene, indecent, and impure language.' If books of this character are to be regarded as within the provisions of St. 1890, c. 70, upon which we express no opinion, we think it reasonable that the parts of the book which the grand jury find to be obscene, indecent, and impure, should be described or referred to in the indictment so specifically that they can be identified by the evidence, unless they are set out according to their tenor. In the present indictment it cannot be known that the defendant has not been indicted upon evidence relating to certain parts of the book, and convicted upon evidence relating to other parts. A picture or print has no tenor, and must of necessity be set out by description, but printed words always can be set out according to their tenor. If this is not done because it is alleged that the language is too indecent to be placed on the records of the court, we think that, in the absence of any statute regulating the procedure, the law requires that the language complained of should be identified by such a description or reference that it may be known that the indictment was found upon the language which is put in evidence and relied on at the trial. If the obscene language complained of appears only in some passages in a book, the rest of which is free from obscenity, the book as a whole should not be presented, but only the book as containing these obscene passages. * * * *
But it appears by the indictment that the book referred to contains other things than the obscene language complained of, and no attempt has been made in the indictment to distinguish between these other things and the obscene language, and no excuse has been given in the indictment for not designating the parts of the book complained of, and the evidence shows that the indictment might easily have described or referred to the novels put in evidence, so that the defendant could have known to what he was called upon to answer at the trial. We are of opinion that the indictment is not reasonably specific, and that it should have been quashed. The exceptions taken at the trial need not be considered."

The full opinion in the McCance case is appended to this brief for the court's convenience.

In Knowles v. State, 3 Day (Conn.) 103, the defendant was charged with exhibiting an unseemly and indecent exhibition. The court held the information insufficient, and unanimously rendered an opinion in which the following appears, at p. 108:

> "The averment in this information, that it is contrary to the statute, may be rejected as surplusage, and will not vitiate. But such an information must particularly state the circumstances in which the indecency, barbarity or immorality, consists; that the court may judge whether the public exhibition of the show amounts to a crime.
>
> "This information alleges, that said Knowles exhibited a horrid and unnatural monster, highly indecent, unseemly, and improper to be seen, or exposed as a show; but states no circumstances in the description of its appearance, which show this allegation to be true; it cannot be supported, either at common law, or on the statute."

The requirement of Section 275 of the Code of Criminal Procedure cannot be overlooked. It provides that an indictment must contain:

> " * * *
>
> "2. A plain and concise statement of the act constituting the crime, without unnecessary repetition."

Section 323 of the Code of Criminal Procedure provides:

> "§ 323. Grounds of demurrer.
>
> "The defendant may demur to the indictment, when it appears upon the face thereof,
>
> * * *
>
> "2. That the indictment does not conform substantially to the requirements of sections

two hundred and seventy-five and two hundred and seventy-six; or

* * *

"4. That the facts stated do not constitute a crime; * * * ".

The objection that the indictment fails to state facts constituting a crime is never waived.

Section 331 of the Code of Criminal Procedure provides:

> "§ 331. When objections, forming ground of demurrer, may be taken at the trial, or in arrest of judgment.
>
> "The objections mentioned in section three hundred and twenty-three can only be taken by demurrer; except that the objection to the jurisdiction of the court over the subject of the indictment, or that the facts stated do not constitute a crime, may be taken at the trial, under the plea of not guilty, and in arrest of judgment."

In England it was always the rule that an indictment for the publication of obscene matter was invalid unless it specifically set forth therein the exact words alleged to be obscene.

In Bradlaugh v. Queen, L. R. 1877-1878, 3 Q.B.D. 607, the court held an indictment insufficient which attempted to avoid setting forth the obscene matter by merely giving the title of the book.

Lord Justice Brett said, at pl 637:

> "It is said the defendants did 'print, publish, sell, and utter, a certain indecent, lewd, filthy, bawdy, and obscene book called the 'Fruits of Philosophy.' It is obvious that the title of the book, 'Fruits of Philosophy,' was not enough to be relied on. Words cannot be more innocent - they never were or could be relied upon as the obscene libel charged. That which was to be relied upon was something written in the book which was so called, and there is no description of anything

contained in that book. What is contained in that book, is not even attempted to be described according to its tenor and effect. There is a total omission of the contents, and yet it was the contents, or some part of the contents, which was to be relied on by the Crown. The words complained of are necessary to the averment in the indictment, and the total omission of them cannot be cured by the verdict."

The courtheld, in that case, that the words alleged to be obscene must be specifically incorporated in the indictment.

In the courts of this country it had become the practice to excuse a statement of the alleged obscene matter, upon the ground that to incorporate the same in the record would pollute the records of the court.

But, even then, where the indictment did not specifically allege that the matter was too obscene to be spread upon the records of the court, the indictment was deemed defective.

People v. Danihy,
63 Hun. 579.

In People v. Danihy, 63 Hun, 579, the defendant was charged with having published obscene matter in his newspaper.

The indictment set out that the matter published was obscene, lewd, lascivious, filthy and indecent.

The court held that this was not sufficient, and that the alleged obscene contents should have been set out in detail.

Presiding Justice Dwight said, at p. 581:

"x x x The objection to this court, that it does not set out the contents of the newspaper complained of, hor any portion of them, is, we think, well taken. It is a cardinal principle of pleading, in both civil and criminal actions, that the complaint (indictment) shall contain a statement, not merely of the charge sought to be established, but of facts which, if taken to be true, support the charge. The pleading must show on its face - its truth being conceded - that the cause of action exists, or the crime has been committed. It is not enough to allege a conclusion of fact; the facts themselves must be alleged from which the conclusion may be drawn; and in a case like the present it is not enough to characterize the publication complained of, but the contents of the publication must be set forth in order that it may appear on the face of the pleading that it is of the character charged.

"The rule which has always held in actions of libel, either civil or criminal, is applicable to this case. A complaint or indictment which only charged that the written or printed matter complained of was libelous or defamatory would certainly be had, not because of a failure to identify the matter, but because it did not appear on the face of the pleading that it was libelous or defamatory. And so the two classes of actions or prosecutions have always been classed together for the purposes of this rule; and it has been held, with great strictness, that in all actions, civil and criminal, in which the cause of action or offense consists in the publication of written or printed matter, the words complained of must be set out in the complaint or indictment."

That case has never been overruled, and has since been cited with approval.

The requirement that the indictment must not only charge the crime claimed to have been committed, but must also set forth the facts constituting the alleged crime, still exists.

The omission of either is fatal.

People v. Knapp, 147 App. Div. at p. 446.

In People v. Helmer, 154 N. Y. at p. 601, the court said:

> "The purpose of an indictment is to identify the charge against the defendant, so that his conviction or acquittal may enure to his subsequent protection, and to apprise him of the nature and character of the offense charged and of the facts which may be proved, so as to enable him to prove his defense."

Section 284 of the Code of Criminal Procedure provides as follows:

> "§ 284. Indictment when sufficient.
>
> The indictment is sufficient, if it can be understood therefrom
>
> " * * * *
>
> 6. That the act or omission, charged as the crime, is plainly and concisely set forth;
>
> 7. That the act or omission, charged as the crime, is stated with such a degree of certainty, as to enable the court to pronounce judgment, upon a conviction, according to the right of the case."

Subsections 6 and 7 of that Section are particularly important because they define the duty of the People and the extent to which a defendant must be safeguarded and apprised of the crime with which he is charged.

In the case of People v. Corbalis, 178 N. Y. 516, the late Chief Justice Parker, sustaining a demurrer to an indictment, and quoting from an earlier opinion by Judge

Danforth in People v. Dumar (106 N. Y. 502), said at p. 520:

> " * * * * for the manifest intention of the legislature in requiring the indictment to state the act constituting the crime was, among other things, that the accused should learn from it what he was called upon to defend."

In a more recent case, People v. Williams, 243 N. Y. 162, Judge McLaughlin said at p. 165:

> "The purpose of an indictment is to identify the charge against a defendant so that his conviction or acquittal may prevent a subsequent charge for the same offense and also to notify him of the nature and character of the crime charged against him to the end that he may prepare a defense."

In People v. Helmer, 154 N. Y. at p. 600, the indictment was held sufficient, but the court laid down the following rule:

> "Under the present practice, an indictment is sufficient if the act or omission, charged as a crime, is plainly and concisely set forth with such a degree of certainty as to enable the court to pronounce judgment according to the right of the case, and no indictment is insufficient by reason of any imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant, upon the merits. Nor does any error or mistake therein render it invalid, unless it actually prejudices or tends to prejudice the defendant in respect to a substantial right. (Code Criminal Procedure, Sec. 284, 285, 684). The purpose of an indictment is to identify the charge against a defendant, so that his conviction or acquittal may inure to his subsequent protection, and to apprise him of the nature and character of the offense charged and of the facts which may be proved, so as to enable him to prepare his defense."

So that it is manifest that there are two objects aimed to be secured by this statute: (1) to guard against the possibility of a second prosecution for the same offense; (2) to inform the defendant of the facts in order that he may prepare his defense.

People v. Peckens, 153 N. Y. 576, 586;

People v. Helmer, 154 N. Y. 596, 600;

People v. Willis, 158 N. Y. 392, 396;

People v. Klipfel, 160 N. Y. 371, 374;

People v. Kane, 161 N. Y. 380, 386;

People v. Corbalis, 178 N. Y. 516, 520.

In Pettibone v. United States (148 U. S. 197, 202), the court said:

> "The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication."

An indictment, although following the language of the statute, must contain a statement of the particular acts or facts which go to constitute the crime in the given instance. Statutes are generic. The indictment must be specific; it must identify the crime.

Wharton (1.Crim. Pr. (10th Ed.) Sec. 269) says:

> " * * * On the general principles of common law pleading, it may be said that it is sufficient to frame the indictment in the words of the statute, in all cases where the statute so far individualates the offense that the offender has proper notice, from the mere adoption of the statutory terms, what the offense he is to be tried for really is. But in no other case is it sufficient to follow the words of the statute. It is no more allowable, under a statutory charge, to put the defendant upon trial without specification of the offense, than it would be under a common law charge."

In United States v. Carll (105 U. S. 611, 612), it is said:

> "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly and expressly, without any uncer-

tainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished."

In the well-known case of United States v. Cruikshank (92 U. S. 542, 558), the court said:

"It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute (includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species, - it must descend to particulars.'."

In Armour Packing Co. v.United States (209 U. S. 56, 83), the court said:

"It is not always sufficient to charge statutory offenses in the language of the statutes, and where the offense includes generic terms it is not sufficient that the indictment charge the offense in the same generic terms, but it must state the particulars."

In Farrell v. State (111 Ark. 180, 196), the court said:

"An indictment for committing a statutory offense may describe the offense in the general language of the statute, but the description must be accompanied by a statement of the particulars essential to constitute the crime charged, and must acquaint the accused with what he must meet upon the trial."

In short,the crime must be "identified". The specific acts which in the given instance go to constitute it must be stated. For example:

The statute makes it an offense to steal "personal proprty." - An indictment, to be good, would have to specify the particular property. "The subject of the act must be more specifically averred, because the words of the definition are generic, and the subject of the larceny is of a species" (Phelps v. People, 72 N. Y. 334, 350).

The statute makes it a crime for one to obtain money or property "by color or aid of fraudulent or false representations or pretense." - An indictment, to be good, would have to "show what the false pretenses were, and state them with reasonable certainty and precision" (People v. Blanchard, 90 N. Y. 314, 319).

Whatton (1 Crim. Pro. (10th Ed.) Sec. 196, 270) collects many illustrations of this necessity for specification. He says:

> "Sec. 196. As the indictment must contain a specific description of the offense, it is not enough to state a mere conclusion of law. * * * In an indictment for obtaining money by false pretenses, it will not suffice merely to state that the defendant falsely pretended certain allegations, but it must also be stated by express averment what parts of the representations were false, for otherwise the defendant will not know to what circumstances the charge of falsehood is intended to apply. * * * An indictment, on the same principle, charging a man with being a common cheat, or a common swindler or defrauder, is bad, and is not helped by an averment that, by divers false pretenses and false tokens, he deceived and defrauded divers good citizens of the said State. A count, also, in an indictment charging that the defendant sold a lottery ticket, and tickets, in a lottery not authorized by the laws of the Commonwealth, is bad, not being sufficiently certain; and so of an indictment for embezzlement charging unlawful loaning of State money, without stating how or to whom, is bad; and so of a count charging the defendant with voting without having the legal qualifications of a voter; and so of a charge that election officers 'did commit wilfull frauds in discharge of duties' is insufficient without setting out the particular acts; and so of a count which charges the defendant with unlawfully and fraudulently adulterating 'a certain substance intended for food, to wit, one pound of confectionery'; and so an indictment under statute for defrauding a hotel-keeper is insufficient, unless the nature and character of the acts and circumstances indicative of fraudulent intent are fully set forth; and so an indictment for defrauding by means of divers false and fraudulent tokens, devices, pretenses and representations, must make specific allegations as to the tokens, devices,

pretenses and representations, or it will be insufficient."

* *

"§ 270. * * * It is made indictable, for instance to obtain goods by falsely 'personating' another. But no one would maintain that it is enough to charge the defendant with 'falsely personating another.' So far from this being the case, the indictment would not be good unless it stated the kind of personation, and the person on whom the personation took effect. An act of Congress, to take another illustration, makes it indictable to 'make a revolt,' but under this act it has been held necessary to specify what the revolt is. * * *

"'Not a qualified voter', in a statute, must be expanded in the indictment by showing in what the disqualification consists. And 'the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution against him. An indictment not so framed is defective, although it may follow the language of the statute.'"

Other examples will be found in:

People v. Winner, 80 Hun 130;

People v. Tatum, 60 Misc. 311, 313-314;

People v. Richardson, 64 Misc. 684;

People v. Burns, 53 Hun 274;

People ex rel Maher v. Potter, 112 N. Y. Supp. 298;

United States v. P. & P. T. Co., 153 Fed. Rep. 997, 1008.

In the Winner case (supra), it is pointed out that an offense consists of "certain acts done" or omitted by a defendant, and it is of those acts that specification must be made.

As the indictment now stands, the defendants may be convicted of having participated in a presentation of

any one of the three acts of the play, and they may be subsequently indicted and convicted for having participated in the other two acts of the play.

This is particularly true in view of the fact that the indictment itself alleges that the defendants participated in "obscene, indecent, immoral, impure scenes, tableaux, incidents, <u>parts and portions</u> of said obscene, indecent, immoral and impure drama, play and exhibition * * * (first count) and "<u>certain scenes and tableaux</u> in said exhibition, show and entertainment, all then and there depicting and dealing with the subject of sex degeneracy and sex perversion" (second count).

Moreover, the defendants are not informed by this indictment of the exact nature of their crime, and this court on reading the indictment will be unable to ascertain with any degree of certainty just what these defendants are alleged to have done.

This court could not under the present indictment pronounce judgment upon a conviction which judgment would bar a subsequent judgment on a conviction for the same offense.

It is manifest that the courts have been zealous in so construing these sections of the Code of Criminal Procedure, that the rights of defendants will not be jeopardized and that defendants will have an opportunity to prepare themselves and to defend themselves.

The long line of decisions quoted at length herein indicates a definite policy on the part of the courts as well as on the part of the legislatures. That policy cannot

be lightly dismissed by the People on the pretext that the records of the court may be besmirched or the dignity of the court offended if obscene matter be placed upon the records.

To charge that a thing is obscene, indecent, immoral or impure, is but a mere generality - a conclusion - and in the absence of particulars showing precisely the exact language used, makes out no offense.

The same observation applies to a charge that a play deals with the subject of sex degeneracy or sex perversion. That also is a mere generality and in the absence of particulars showing precisely by reference to the language used, no crime is spelled out; and precisely the same objection applies to a count of an indictment charging a defendant with maintaining a public nuisance in that he gave an indecent or obscene show and/or a show dealing with the subject of sex degeneracy or sex perversion.

This indictment is virtually identical with that in the recent case of People v. Zambounis, 251 N. Y. 94, referred to above. The Court of Appeals there pointed out, at p. 87, that:

> "Forms and procedure still have their place and purpose in the administration of the law; without them we would have chaos. Much impatience is being shown with the technicalities of the law, and at times it is justified. The requirement that an indictment, and an information must state the crime with which a defendant is charged, and the particular acts constituting that crime is more than a technicality; it is a fundamental, a basic principle of justice and fair dealing, as well as a rule of law."

The opinions in the Zambounis case and in the case of Commonwealth v. McCance, which are appended to this brief, establish the proposition that in a prosecution for violating statutes against obscene publications or performances, unless the allegedly obscene matter is set out in full in the indictment, the indictment must specifically identify the allegedly offensive matter so as to leave no doubt about the exact nature of the offense charged.

An additional reason for granting the motion and for designating this as a bad indictment exists in the peculiar provisions of the Wales Act, under which the two counts of this indictment are set forth. (Section 1140a, Penal Law.)

That section was enlarged in 1927. Originally, Section 1140a was enacted as Chapter 279 of the Laws of 1909, and it provided as follows:

> "§1140-a. Any person, who as owner, manager, director or agent or in any other capacity prepares, advertises, gives, presents or participates in, any obscene, indecent, immoral or impure drama, play, exhibition, show or entertainment, which would tend to the corruption of the morals of youth or others, and every person aiding or abetting such act, and every owner or lessee or manager of any garden, building, room, place or structure, who leases or lets the same or permits the same to be used for the purpose of any such drama, play, exhibition, show or entertainment, knowingly, or who assents to the use of the same for any such purpose, shall be guilty of a misdemeanor."

It was amended by Chapter 690 of the Laws of 1927, so as to read in its present form.

Under the amendment, one could be prosecuted for participating in, preparing, etc., a part or portion of a play. No such provision was contained in the 1909 Act.

Under the 1909 Act, there could be no prosecution unless the entire work were bad. The Wales Act of 1927 provides for prosecution for so much of the work which is bad, regardless of the rest of the work.

The result is that under the Wales Act, a defendant could be prosecuted for having written obscene matter in the first act of a play. He could be prosecuted, subsequently, for having written obscene matter in the second act of a play; and subsequently, could be prosecuted for having written obscene matter in the third act of the play. Each part or portion of the play is treated, under the act, apparently, as an independent crime and subject to an independent indictment.

Consequently, if the indictment does not set out what particular parts are claimed to be obscene, the grand jury may continue to indict the same defendant, indefinitely, as and when it obtains evidence as to new portions of the play which it may deem to be obscene.

This would be most unjust to a defendant and would subject him to actual persecution.

To do away with such a situation, it became doubly necessary for this indictment to specify, with particularity, the obscene matter. It was an additional reason for such specification and makes the indictment especially bad from an aspect which had never been considered by earlier decisions and could not have been so considered prior to the amendment of 1927.

Since the indictment in the case at bar does not give any clue as to the scenes, tableaux, incidents or portions of the play which are alleged to violate the stat-

ute, the indictment is fatally defective, and should be dismissed.

POINT 2

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THE BILL OF PARTICULARS CANNOT MAKE A BAD INDICTMENT GOOD.

The Bill of Particulars even in civil actions is not regarded as part of the record and cannot be used to cure a defective pleading.

United States Printing & Lithograph Co.v.Powers
171 A.D.406(First Dept.)

American Surety Co. v. Loomis,132 Misc.62.

Hoey v. Kilduff, 65 Misc.554.

Donald v. Gearhardt 42 Misc.269.

Toplitz v.King Bridge Co. 20 Misc.577.

A fortiori, a Bill of Particulars cannot be held to cure a defective indictment.

Rosen v. United States 161 U.S.47.

In People v. Corbalis,178 N.Y.516, it was argued that an indictment which did not state the facts with sufficient certainty should not be regarded as defective inasmuch as the defendant could have applied for a Bill of Particulars.

The court however in reversing a conviction held the indictment insufficient and pointed out that the accused is entitled to be informed of the specific facts which constitute the charge which she is called upon to defend.

Chief Justice Parker said as follows at page 522:

> "The learned judge who wrote the opinion of the Appellate Division appreciated the force of the argument of defendants that it is impossible under such an indictment for the accused to properly prepare for trial, but he suggested that defendants could be relieved from this embarrassment by making a motion for a bill of particulars. The difficulty with that remedy is that whether a bill of particulars shall be granted or not rests in the discretion of the court. A motion may be made, it is true; but it need not be granted. Hence, it is the duty of the courts to see to it that the right which the legislature has accorded to a citizen accused of crime to have the indictment state the acts constituting the crime so

> that he may prepare his defense, and be protected against further prosecution, be not frittered away by holding that the requirement of the statute will not be insisted upon, and that upon defendant will be placed the burden of ascertaining, if he can, by a motion for a bill of particulars, addressed to the discretion of the court, what particular act or acts the People claim make out the crime charged."

In American Surety Company v. Loomis, 132 Misc.62, the court in holding that a Bill of Particulars does not make a bad complaint good said at page 63:

> "Its deficiencies cannot be cured by statements in plaintiff s bill of particulars. The contents of a bill of particulars may, it is true - as a result of admissions therein contained - under certain circumstances render an otherwise good complaint bad, but they can never make an otherwise bad complaint good."

In U.S.Printing & Lithograph Co. v. Powers, 171 A.D. 406, Judge Scott said at page 408:

> "It is well settled that a bill of particulars is no part of the pleadings, and that it cannot enlarge a cause of action or perfect an imperfect pleading.(Dodge v. Weill, 158 N.Y.346). It cannot be pleaded to and it will not serve to render a defective pleading immune from demurrer."
>
> "In the present case the complaint is defective because in its 5th paragraph it alleges only a legal conclusion as to the effect of'various' agreements when read together, without specifying in letter or substance the tenor of any one of the agreements. Such a complaint cannot be answered except by meeting one legal conclusion with another, and there is not stated, on the face of the complaint, enough to enable the court to determine which legal conclusion should be sustained."

In Hoey v.Kilduff, 65 Misc.554, Judge Giegerich said as follows at page 556:

> "Upon a trial, a bill of particulars limits the proof; while upon demurrer, or motion for judgment upon the pleadings dismissing the complaint because it does not state facts sufficient to constitute a cause of action, the bill of particulars has nothing to do with the complaint, as it forms no part of the record."

In Donald v. Gearhardt, 42 Misc.269, the court said as follows on page 270:

> "The plaintiff cannot rely on his bill of particulars to cure the defect existing in his complaint. The purpose of a bill of particulars is to limit the testimony on the trial to the items in the bill, and a party cannot plead or answer to such a bill. The answer must be to the pleading and not to the bill of particulars which forms no part of the record.Kreiss v. Seligman, 8 Barb,430; Spies v. Michelsen,15 Misc. Rep.414."

In Toplitz v. King Bridge Co., 20 Misc. 576, the court said at page 580:

> "The appellant claims that this omission in the counterclaim was supplied by its bill of particulars which set forth the facts constituting the special damage. But the bill of particulars is not a part of the pleadings and cannot enlarge the cause of action. Abbott's Brief on Pleadings,pp.125 and 624, § § 133 and 745."

This indictment does not inform the defendants of the specific acts, which are alleged to constitute the crimes charged in the indictment.

This is a defect of substance and cannot be cured by a Bill of Particulars to which a defendant is entitled only as a matter of discretion.

It is not for the District Attorney to take such portions of the play as he thinks and claim that they are indecent and obscene. This is what ,the District Attorney did when he furnished the Bill of Particulars.

The Grand Jury by failing to state the indecent portions in the indictment have not indicated which parts of the play they deemed indecent. It is for the Grand Jury and for it alone to determine which parts of the play they deem to be

indecent. This is not the function of the District Attorney who has no such power.

The District Attorney has no right to say which parts of the play are deemed indecent if the Grand Jury has failed to state it.

The District Attorney is limited in the Bill of Particulars to amplify merely such portion of the indictment as has been sufficiently passed upon and set forth by the Grand Jury, as provided by Sections 275, 323, 330 and 331 of the Code of Criminal Procedure.

In getting up a further bill the District Attorney may take out other portions of the play which he deems indecent. How do we know that the Grand Jury deems them indecent since the indictment fails to show what parts of the play were deemed indecent and obscene by the Grand Jury?

Since the motion to inspect the Minutes of the Grand Jury was denied, defendant had no means until the present day, and has no way of knowing at this time what parts of the play were actually deemed to be indecent or obscene by the Grand Jury which indicted these defendants.

In Commonwealth v. McCance 164 Mass.162, the court said at page 165:

> * * * *we think it reasonable that the parts of the book which the grand jury find to be obscene, indecent, and impure, should be described or referred to in the indictment so specifically that they can be identified by the evidence, unless they are set out according to their tenor. In the present indictment it cannot be known that the defendant has not been indicted upon evidence relating to certain parts of the book, and convicted upon evidence relating to other parts."

The Bill of Particulars is not a part of the indictment and cannot be considered in determining whether or not the indictment is sufficient.

THE INDICTMENT SHOULD BE DISMISSED.

Respectfully submitted,

NATHAN BURKAN,
Attorney for Defendants,
other than defendant,
Davenport.

Suffolk. November 26, 1894.--June 24, 1895.

Present: Field, C. J., Allen, Holmes, Knowlton, Morton, Lathrop & Barker, JJ.

Indictment not specifying the Parts of a Book relied on as Obscene.

An indictment under St. 1890, c. 70, charging the defendant with selling a book containing, among other things, obscene language, must be quashed if it does not specify with reasonable certainty the parts of the book relied on as obscene.

Field, C. J. This is an indictment under St. 1890, c. 70. The defendant is charged with "knowingly, unlawfully, feloniously, wickedly, and scandalously" selling "to one Jefferson H. Parker a certain book, then and there called 'The Decameron of Boccaccio,' and which said book, upon the title-page thereof, was then and there of the tenor following, that is to say, 'The Decameron; or Ten Days' Entertainment of Boccaccio. A revised translation by W. K. Kelly, with portrait and ten illustrations, drawn and engraved by Leopold Flameng. Published for the Trade,'--and which said book then and there contained, among other things, certain obscene, indecent, and impure language, and manifestly tending to the corruption of the morals of youth, which said book is so lewd, obscene, indecent, and impure that the same would be offensive to the court here and improper to be placed upon the records thereof, wherefore said jurors do not set forth the same in this indictment," etc. The defendant moved to quash the indictment for this among other reasons, that "the indictment sets forth in no legal and sufficient terms wherein said book is amenable to the penalties denounced by the statutes; no specifications of any offending passage is (sic) exhibited." This motion was overruled, and the defendant excepted.

The exceptions also recite as follows: "The government introduced in evidence the book described in the indictment, and caused to be read the following passages from the said book: Novel 1, Third Day; Novel 2, Fourth Day; Novel 4, Fifth Day; Novel 7, Sixth Day; Novel 8, Eighth Day; Novel 8, Ninth Day. No evidence of the character of the book was adduced by the Commonwealth other than the book itself."

The book introduced in evidence is a volume of 710 printed pages, most of which are in the English language, but a few pages are in the original Italian language, with a translation of these into the French language appended. There is a short preface, and at the end of some of the novels are short historical notes by the translator, and each day's entertainment is preceded by an introduction. The Decameron of Boccaccio is a book well known to students of literature, and contains ten novels or stories for each of ten days' entertainment. Of these one hundred novels six only were introduced in evidence by the Commonwealth. We cannot know what parts of the book the grand jury found to be obscene, indecent, and impure, and we know of no way whereby from the indictment the defendant could know before

the trial what parts of the book would be put in evidence by the Commonwealth.

The first precedent, so far as we know, for an indictment in this form, is the second count of the indictment in Commonwealth v. Holmes, 17 Mass. 336. In that case the court say: "The second and fifth counts in this indictment are certainly good; for it can never be required that an obscene book and picture should be displayed upon the records of the court; which must be done if the description in these counts is insufficient. This would be to require that the public itself should give permanency and notoriety to indecency, in order to punish it." This decision has been followed by many of the courts in this country. See People v. Girardin, 1 Mich. 90; State v. Pennington, 5 Lea, (Tenn.) 506; McNair v. People, 89 Ill. 441; Fuller v. People, 92 Ill. 182; State v. Brown, 27 Vt. 619; State v. Griffin, 43 Tex. 588; State v. Smith, 17 R. I. 371; United States v. Bennett, 16 Blatchf. C.C. 338. No authorities are cited in Commonwealth v. Holmes, and the opinion in Commonwealth v. Wright, 1 Cush. 46, shows that the decision in Commonwealth v. Holmes must be regarded as an exception to the general rule of pleading relating to libellous publications.

Commonwealth v. Tarbos, 1 Cush. 66, decides that in an indictment for publishing an obscene paper, if the indictment purports to set out the alleged obscene publication, it must do it in the very words of the paper, and the court say: "The excepted cases occur, whenever a publication of this character is so obscene as to render it improper that it should appear on the record; and, then, the statement of the contents may be omitted altogether, and a description thereof substituted; but, in this case, a reason for the omission must appear in the indictment, by proper averments." See Commonwealth v. Dejardin, 128 Mass. 46. Commonwealth v. Wright, 139 Mass. 382, where the indictment was quashed, decides that the indictment "Must, at least by some general description, identify the paper" which is alleged to contain obscene matter, and which the defendant is charged with publishing. This question of the mode of pleading in cases of this kind was considered in England by the Court of Appeal in Bradlaugh v. The Queen, 3 Q. B. D. 607, and it was unanimously decided that the words alleged to be obscene must be set out according to their tenor. The two principal Massachusetts cases were considered, and the decision in Commonwealth v. Holmes was not approved. Ibid. 621, 638, 641.

But the weight of authority in this country is in favor of the decision in Commonwealth v. Holmes, and the principle of that decision has been several time recognized by this court as correct, and we think that it must be regarded as an established rule of law in this Commonwealth.

It remains to be considered whether the present indictment contains a reasonably specific description of the obscene, indecent, and impure language which it is alleged that the book, among other things, contains. The Decameron of Boccaccio was probably not written for the purpose of corrupting the morals of youth. It was written long before the invention of printing, when the number of persons who could read were few, and it is supposed to represent the taste of many cultivated people of the world in Italy at the time.

It was read for the entertainment of men and women. Parts of it are coarse, and according to the standards of modern times are obscene, indecent, and impure, and other parts of it are decent and pure enough to be read by the present generation. Because it is not a book which is wholly obscene, indecent, and impure, the book is described in the indictment as containing, "among other things, certain obscene, indecent, and impure language." If books of this character are to be regarded as within the provisions of St. 1890, c. 70, upon which we express no opinion, we think it reasonable that the parts of the book which the grand jury find to be obscene, indecent, and impure, should be described or referred to in the indictment so specifically that they can be identified by the evidence, unless they are set out according to their tenor. In the present indictment it cannot be known that the defendant has not been indicted upon evidence relating to certain parts of the book, and convicted upon evidence relating to other parts. A picture or print has no tenor, and must of necessity be set out by description, but printed words always can be set out according to their tenor. If this is not done because it is alleged that the language is too indecent to be placed on the records of the court, we think that, in the absence of any statute regulating the procedure, the law requires that the language complained of should be identified by such a description or reference that it may be known that the indictment was found upon the language which is put in evidence and relied on at the trial. If the obscene language complained of appears only in some passages in a book, the rest of which is free from obscenity, the book as a whole should not be presented, but only the book as containing these obscene passages.

The records of the Court of Common Pleas and of the Supreme Judicial Court for the County of Worcester contain no copy of the book entitled "Memoirs of a Woman of Pleasure," referred to in the indictment in Commonwealth v. Holmes, but apparently the whole book was presented and the indictment was at common law. The statutes on the subject were first enacted here in Rev. Sts. c. 130, §10. It may be suggested that, on a motion to quash the indictment, the court cannot take judicial notice of the contents of the book referred to in the indictment. But it appears by the indictment that the book referred to contains other things than the obscene language complained of, and no attempt has been made in the indictment to distinguish between these other things and the obscene language, and no excuse has been given in the indictment for not designating the parts of the book complained of, and the evidence shows that the indictment might easily have described or referred to the novels put in evidence, so that the defendant could have known to what he was called upon to answer at the trial. We are of opinion that the indictment is not reasonably specific, and that it should have been quashed. The exceptions taken at the trial need not be considered.

Exceptions sustained.

P. H. Hutchinson, for the defendant.
F. E. Hurd, First Assistant District Attorney, for the Commonwealth.

COURT OF GENERAL SESSIONS,
PART IX, JANUARY 1930 TERM THEREOF,
OF THE COUNTY OF NEW YORK.

* *

THE PEOPLE OF THE STATE OF NEW YORK

-against-

MAE WEST, et als,

DEFENDANTS.

Calendar No.
53,002

Indictment No.
174,820 1/2

* *

MEMORANDUM IN OPPOSITION TO MOTION FOR A SPECIAL JURY

The People, have moved for a special jury under the provisions of Chapter 602 of the Laws of 1901, as amended by Chapter 458 of the Laws of 1904, and Chapter 742 of the Laws of 1923.

Section 5 of the Amendment of 1923 provides as follows:

"§ 5. Whenever an issue of fact has arisen in any civil or criminal action triable in a county embraced within the provisions of this act, the district attorney, or the defendant, if in a criminal action, or either party in a civil action may apply for a special jury to try such issue. Such application may be made at any term of the Supreme court appointed to be held within the county where such issue is triable, or at any term of any other court of record in which court such issue is to be tried. It must be made upon the indictment, the plea thereto and an affidavit in a criminal action or the pleadings and affidavit in a civil action upon two days' notice to the adverse party or his attorney. Where, upon such application, it appears to the court that by reason of the importance or intricacy of the case, a special jury is required, or that the subject-matter of the indictment or the issue to be tried has been so widely commented upon that the court is satisfied that an ordinary jury cannot without delay and difficulty be obtained to try such issue, or that for any other reason the due, efficient and impartial administration of justice in the particular case would be advanced

> by the trial of such an issue by a special jury, the court to which the motion is made may make an order directing that such trial be had by a special jury, and such trial shall be had accordingly."

The affidavit annexed to the notice of motion does not state any facts whatsoever which show a necessity for a special jury under the statute hereinabove set forth.

The affidavit contains nothing but conclusions, as appears from the following paragraph thereof:

> "That the facts in the case involve intricate questions of fact and law; that this case has been widely commented upon in the public press; and your deponent verily believes that unnecessary delay and difficulty will be caused by an attempt to obtain an ordinary jury to try the issues raised by the People of the State of New York and the said defendants in this case, and several days will be consumed in obtaining an ordinary jury, owing to the character of the charge."

Nothing appears from the affidavit or from the indictment to show that intricate questions of fact and law are involved, or that the case has been so widely commented upon in the public press as to warrant the necessity of a special jury; nor is there any foundation for the belief that unnecessary delay and difficulty will be caused by an attempt to obtain an ordinary jury; nor is anything contained in the affidavit to show that this is a case of great importance.

The questions of fact and law in this case are very simple. The bill of particulars sets out definitely and clearly the precise parts of the play which are alleged to violate the statute.

There is no difficult question of law; rather, as Judge Andrews of the Court of Appeals pointed out in the recent case of Halsey v. N. Y. Society, 234 N. Y. 1, the

question as to whether a particular book or play is indecent, is one particularly for the jury, rather than for the court.

Judge Andrews points out the necessity of having this question passed upon by a jury which is composed of men of varied experiences engaged in various occupations, rather than of a select group. He said at p. 6:

"The conflict among the members of this court itself points a finger at the dangers of a censorship entrusted to men of one profession, of like education and similar surroundings. Far better than we, is a jury drawn from those of varied experiences, engaged in various occupations, in close touch with the currents of public feeling, fitted to say whether the defendant had reasonable ground to believe that a book such as this was obscene or indecent. Here is the work of a great author, written in admirable style, which has become a part of classical literature. We may take judicial notice that it has been widely sold, separately and as a part of every collection of the works of Gautier. It has excited admiration as well as opposition. We know that a book merely obscene soon dies. Many a Roman poet wrote a Metamorphoses. Ovid survives. So this book also has lived for a hundred years.

"On the other hand, it does contain indecent paragraphs. We are dealing too with a translation where the charm of style may be attenuated. It is possible that the morality of New York city today may be on a higher plane then that of Paris in 1836 -- that there is less vice, less crime. We hope so. We admit freely that a book may be thoroughly indecent, no matter how great the author or how fascinating the style. It is also true that well-known writers have committed crimes, yet it is difficult to trace the connection between this fact and the question we are called upon to decide. Doctor Dodd was hanged for forgery, yet his sermons were not indecent. Oscar Wilde was convicted of personal wrongdoing and confined in Reading Gaol. It does not follow that all his plays are obscene. It is also true that the work before us bears the name of no publisher. That the house which issued it was ashamed of its act is an inference not perhaps justified by any evidence before us.

"Regarding all these circumstances, so far as they are at all material, we believe it is for the jury, not for us, to draw the conclusion that must be drawn. Was the book as a whole of a character to justify the reasonable belief that its sale was a violation of the Penal Law? The jury has said that it was not. We cannot say as a matter of law that they might not reach this decision. We hold that the question of probable cause was properly submitted to them."

The statement that a special jury is necessary because of the wide comment which this case has received in the public press, is absurd.

The District Attorney in a memorandum submitted in opposition to a previous motion for a change of venue herein, stated as follows at p. 13:

> "As things go in the City of New York, the headlines in a newspaper of today are matters of past history the day after. A sensation of today immediately gives way to another one of tomorrow."

Nothing of any moment has appeared in the newspapers of this city of recent date concerning this case.

As the District Attorney has previously stated, it is a matter of "past history" to the people of this city.

There are no facts stated in the affidavit of James C. Wallace in support of this motion which would indicate that it will take several days to obtain an ordinary jury.

There is no reason to suppose that this case in that respect will be different from any other. This is not a case of great importance. The very fact that the crime with which the defendants are charged is merely a misdemeanor and not a felony would so indicate.

There is nothing new nor unusual nor novel about a prosecution under Section 1140 a of the Penal Law, and there is no reason why a prosecution under that section should be

deemed of greater importance to the community than a prosecution under any other section of the Penal Law.

The statute providing for special juries does not contemplate their use in ordinary situations.

In People v. Hall, 169 N. Y. 184, the Court of Appeals in discussing the reason behind the enactment by the legislature of the provision providing for a special jury, stated as follows, at P. 196:

> "The affidavit upon which the Appellate Division acted in ordering a special jury in this case stated, among other things, that the indictment was for murder in the first degree. This was enough to give the Appellate Division jurisdiction, in its sound discretion, to make the order, for a trial involving the life of a human being is of such importance, both to him and to the public, as to bring the case within the meaning of that word as used in the statute. In prescribing the qualifications of special jurors, the legislature seems to have had capital cases primarily in mind, for the commissioner is prohibited from selecting any person as a special juror, 'who possesses such conscientious opinions with regard to the death penalty as would preclude his finding a defendant guilty if the crime charged be punishable with death,' or 'any person who possesses such opinions as would prevent his finding a verdict of guilty in any case upon circumstantial evidence,' or 'any person who avows such a prejudice against any particular defense to a criminal charge as would prevent his giving a fair and impartial trial upon the merits of such defense.' (Sec.8) "

In People v. Raizen, 120 Misc. 182, the court followed the case of People v. Hall supra and held that a special jury should be granted where the trial involved a charge of murder in the first degree. The court stated as follows:

> "In People v. Hall, 169 N. Y. 184, the affidavit supporting a similar application was in substantially the same language as is employed here. The order granting a special jury in that case was reviewed by the Court of Appeals upon an appeal from the verdict of guilty, and the court there held (at p. 197) that inasmuch as the subject of the indictment was for murder in the first degree, that was sufficient to bring the application within the statute.
>
> "So that when it is made to appear that the

subject-matter of the indictment is of sufficient importance to so warrant, a special jury may be authorized.

"Since no action is more important to a defendant or to the People of the State of New York than that of the proper disposition of an indictment charging murder in the first degree, this motion must be granted."

This case does not involve a charge of murder. The primary purpose of the legislature in enacting the said statute providing for the calling of a special jury was to avoid needless delay, in that thereby the commissioner of jurors was enabled to choose those persons as jurors in murder cases, who were not opposed to capital punishment.

The instant action is not of such great importance as to require a special jury. The charge is but a misdemeanor and as such in the usual manner of prosecution, would not have been brought in General Sessions, but tried before the Court of Special Sessions. The play upon which this prosecution is based was performed but two nights in the theatre. The show opened on the 1st of October, 1928 and it was closed on the 2nd of October, 1928.

There is nothing in any way unusual about this case, and there is no reason why the ordinary jury provided by law is not competent to cope with this situation, especially in view of the statement of Judge Andrews, hereinabove quoted, to the effect that "a jury drawn from those of varied experience engaged in various occupations, in close touch with the currents of public feeling" is best fitted to judge whether the play upon which this prosecution is based was obscene or indecent.

In Adams v. Morgan, 21 N. Y. Supp. 1057, Judge Dykman, in holding that a special jury was not necessary in a libel case, said at p. 1058:

"We can find nothing in the papers to justify an inference or belief that a fair and impartial trial of this action cannot be had before a jury formed in the ordinary way. There is no claim of any public excitement in the country respecting the action, and the safeguards thrown round the formation of juries in Kings county render it impossible for the introduction of any improper practice in that respect. Neither does the importance or intricacy of the case require a struck jury. It is not an intricate case, and it is important only to the immediate parties. It is not as intricate either in the law or facts involved as a border negligence case, and such cases are tried before the ordinary juries at many circuits, with satisfactory results. Libel suits are not infrequent, and the law which controls them is well settled and understood, and the questions of fact submitted to the jury in such cases are not unusually intricate."

To the same effect is his statement in Ives v. Ranger, 20 N. Y. Supp. 32, at p. 33:

"Moreover, the teaching of experience is in favor of the jury summoned in the ordinary manner. The most important questions, involving life, liberty, and property, are constantly submitted to the ordinary jury, with satisfactory results, and it requires an extraordinary case to justify the issuance of an order for a special jury. If it is to be assumed that a special jury is to be composed of extraordinary members, it is quite doubtful whether such men will be as likely to agree and produce results as satisfactory as the jury of conservative men, such as are ordinarily found upon juries."

It is difficult to conceive of a more appropriate case to be tried before an ordinary jury. As Judge Andrews said in People v. Muller, 96 N. Y. 408, at p. 412:

"The question whether a picture or writing is obscene is one of the plainest that can be presented to a jury, and under the guidance of a discreet judge there is little danger of their reaching a wrong conclusion."

In People v. Eastman, 188 N. Y. 478, the defendant was indicted for selling and exposing the sale of certain printed matter of an indecent character. In the dissenting opinion of Judge O'Brien, in which Judge Cullen and Chief

Judge Haight concurred, we find the following:

> " * * * The question in all of these cases must be, what is the impression produced upon the minds by perusing or observing the writing or picture referred to in the indictment, and one person is as competent to determine that as another."

If, as was stated in that case, one person is as competent as another, to determine whether or not certain material is obscene and indecent, what need is there for a special panel? The District Attorney has failed to show any good reason for the granting of this motion.

In this case it is essential that the jury be composed of men representing varied occupations and varied groups in the community.

A prosecution under Section 1140 a not only does not call for a special jury, but is one which peculiarly demands a trial by the ordinary jury picked in the usual way.

In the interest of justice the motion for a special jury should be denied.

Respectfully submitted,

NATHAN BURKAN,
Attorney for Defendants
other than Davenport.

Requests to charge

1.

Before the jury can convict any defendant under the first count of the indictment, they must find beyond a reasonable doubt that the defendant as the owner, manager, producer, director, actor or agent, or in a similar capacity, prepared, advertised, gave, directed, presented or participated in any obscene, indecent, immoral or impure show, or in any obscene, indecent, immoral or impure scene, tableau, incident, part or portion thereof, and they must further find beyond a reasonable doubt that such show or the scene, tableau, incident, part or portion thereof complained of, tends to the corruption of the morals of youth or others.

2.

The phrase "that the obscene, indecent, immoral or impure matter must tend to the corruption of the morals of youth or others" means that it is matter which when presented upon the stage must have a tendency to deprave and corrupt the minds of those who might see the performance, and whose minds are open to such influences, by exciting lustful desires, creating impure imaginations, and by provoking sexual cravings or desires.

3.

Unless the jury find beyond a reasonable doubt that the matter complained of is naturally calculated to and does excite in the spectator lustful thoughts and sexual desires, the matter is not obscene, indecent, immoral or impure.

Matter that is merely coarse, rough, profane, unbecoming, repulsive, disgusting, revolting, offensive, vile or vulgar, is not a violation of the statute. The statute only has reference to that form of immorality which relates to sexual impurity; that is, matter that tends to suggest to or create in the mind of the spectator libidinous thoughts or to excite or give rise to sexually impure desires in the spectator. It must have a tendency to deprave the moral senses by suggesting or appealing to sexual lust, and that must be established beyond a reasonable doubt.

5.

If the matter does not incite to immorality relating to sexual impurity by exciting sexual cravings, then it is not a violation of the statute. Matter which would repel even an abnormal mind, is not a violation of the statute.

6.

The matter must have a tendency to excite the sexual feelings and desires and must tend to deprave the morals of the spectator in that direction. It is not enough that the matter merely relates to sexual matter and illicit sexual relations, but it must be clothed in language and contain expressions or convey by action thoughts which, with reasonable persons, tends to excite the sexual desires or passions.

7.

If the matter complained of does not tend to excite the sexual desires or passions of the normal man or woman, but on the contrary, is repellant and disgusting to the normal man or woman, then the jury must acquit

8.

Unless the jury find beyond a reasonable doubt that the matter complained of excites animal passions and debauches and corrupts the mind, and is not merely such as is merely coarse, vulgar, revolting, disgusting, rough, repellant ~~sive~~, offensive or vile, in the popular sense of those terms, the jury must acquit.

9.

Subdivision 2 of Section 1140a deals with the subject of sex degeneracy or sex perversion; that is, sex relations by one person with another of his own sex. The statute only has reference to that form of immorality which relates to sexual impurity between persons of the same sex. To convict a defendant under subdivision 2 of Section 1140a, the matter complained of must have a tendency to deprave and corrupt the minds of those who might see the performance and whose minds are open to such influences, by exciting lustful desires, creating impure imaginations, and by provoking sexual cravings or desires, and unless the jury find beyond a reasonable doubt that the matter complained of is naturally calculated to and does excite in the spectator lustful thoughts and sexual desires, the matter is not a violation of subdivision 2 of Section 1140a.

10.

To convict a defendant for a violation of subdivision 2 of Section 1140a, the matter complained of must actually depict or deal with the subject of sex degeneracy or sex perversion; that is, sexual relations between persons of the same sex.

11.

It is no violation of any law of the State of New York for a male person to appear upon the public stage of this state and to play the part of a female and to appear in the dress, garb and make-up of a female, and in the presentation of such role to imitate the voice, manner of speech, walk and deportment of a female.

12.

It is no violation of law for a male actor to appear upon the public stage naturally possessed of a high-pitched or falsetto voice, and naturally walking by swaying his body. The voice and walk of man, talking and walking as God endowed him, is no violation of any law.

13.

It is no violation of law for an actor in male attire to speak in a high-pitched or falsetto voice and sway his body in walking.

14.

There can be no conviction in this case unless the jury find beyond a reasonable doubt that the matter complained of in reality depicted or dealt with the subject of sexual relations between persons of the same sex.

15.

A play may serve no useful purpose; it may not even teach a moral lesson, yet if it does not tend to excite lustful or lecherous desire, it does not offend against the statute.

People v. Brainard, 192 App. Div. 816.

16.

The jury must take into consideration and apply the present moral standards of the community and the prevailing moral sense.

People v. Tykoff, 212 N. Y. 197.

17.

The jury must be convinced beyond a reasonable doubt that the parts of the play complained of would tend to the corruption of the morals of youth or others, and if they are not convinced beyond a reasonable dount that such parts would have that tendency, they must acquit on both counts.

18.

Under Section 1140a of the Penal Law, under which these defendants are indicted, the words "obscene", "indecent", "immoral" and "impure" must be construed together in one way, and they must all be deemed synonymous and must all be applied in a limited sense, and that before the jury can convict they must be satisfied that in order for the play to come within the definition of obscene, indecent, immoral and impure or any of these adjectives, it must be such a play as to tend to arouse or stimulate lustful desires, and in addition thereto, it must also tend to corrupt the morals of youth and others.

People v. Eastman, 188 N. Y. 478;
People v. Muller, 96 N. Y. 411.

19.

It is not enough that the play or portions of the play may be coarse or vulgar, because mere coarseness or vulgarity is not prohibited by the statute.

U. S. v. Smith, 11 Fed. 663;

U. S. v. Whightman, 29 Fed. 636;

U. S. v. Wyatt, 122 Fed. 316;

U. S. v. O'Donnell, 165 Fed. 218.

20.

If the play should repel or horrify or arouse disgust, then it is not to be deemed obscene, indecent, immoral or impure.

U. S. v. O'Donnell, 165 Fed. 218;

U. S. v. Davidson, 244 Fed. 523.

21.

It is not enough that the play contain matter relating to sexual matters or illicit sexual relations; it must be clothed in language and contain expressions which with reasonable persons tend to excite the sexual desires or passions or corrupt the morals of the onlooker in that direction.

U. S. v. Davidson, 244 Fed. 523.

Swearingen v. U. S., 161 U. S. 446.

22.

The same test which is applied to a play that is alleged to be obscene, indecent, immoral and impure, applies to the second count of the indictment, which ~~alleges~~ charges sex degeneracy, and the jury is to be convinced beyond a reasonable doubt, before they can convict, that the defendants

produced a play which tended to arouse sexually degenerate desires or appetites and to corrupt the morals of youth and others.

23.

The jury must disregard any evidence which was given on this trial by the People's witnesses as to the meaning or innuendo of any of the words or language used in this play. It is for the jury alone to determine the meaning of the words and the effect of the actions testified to. In arriving at this meaning they are to be guided by their experience and knowledge alone.

Halsey v. New York Society, 234 N.Y. 1;

People v. Muller, 96 N. Y. 408;

People v. Seltzer, 122 Misc. 329;

Krause v. U. S. 29 F. (2d) 248.

24.

The jury must take the words and the actions of the play as they have been testified to in the light of their everyday meaning and acceptation, and if the words and acts are innocent on their face, the jury has no right to speculate as to whether or not they may have a hidden meaning or a double meaning or a meaning which may be regarded by or given to a small or separate group.

25.

If the words or acts testified to are innocent on their face, the jury has no right to speculate as to whether or not these words or acts may have some hidden sinister meaning.

26.

The burden rests upon the People to prove every essential element of the offenses charged in the indictment. This burden is carried by the People throughout the trial and never shifts to the defendants.

27.

The defendants enter upon the trial of a case with the presumption of innocense in their favor, and this presumption remains with them throughout the trial in the nature of evidence as a shield and protection until the People satisfy the jury by evidence beyond a reasonable doubt of their guilt.

28.

If the jury has a reasonable doubt arising out of the evidence adduced here, that reasonable doubt becomes the property of the defendants, and they are entitled to an acquittal at the jury's hands.

29.

It is important to these defendants that they should be tried fairly, judged fairly and a verdict rendered which is consistent with the evidence. They should not be judged by any bias or prejudice. Their calling in life should not be regarded against them in the slightest degree. They pursue what is called an artistic calling.

30.

If the jury should be in doubt as to the guilt or innocence of any of the defendants, it is their duty to find the defendants innocent unless they are of the opinion that the District Attorney has proved the defendants' guilt beyond a reasonable doubt.

31.

Every person is presumed to be innocent until his guilt is proved beyond a reasonable doubt. The presumption of innocence is evidence in favor of the accused, introduced by the law in his behalf.

Wiener v. U. S., 282 Fed. 801.

32.

No juror should suffer himself to be influenced in the slightest degree by the fact that the defendants were arrested, the play closed, and an indictment has been found against the defendants.

Cooper v. U. S., 9 F. (2d) 226.

33.

It is necessary for the People to establish every element of the crime charged by legal evidence, even assuming it is not contradicted beyond a reasonable doubt. The evidence introduced to prove the facts involves the credibility of witnesses. The plea of not guilty and the presumption of innocence make the credibility of every witness for the People in a criminal action a question of fact for the jury.

People v. Walker, 198 N. Y. p. 334.

34.

If, after consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendants, it is the duty of such juror so entertaining such doubt not to vote for a verdict of guilty, nor to be influenced in so voting, for the single reason that a majority of the jury should be in favor of a verdict of guilty.

People v. Dole, 122 Calif. 486;
55 Pac. 581;

Peterson v. U. S., 213 Fed. 920;

Allis v. U. S., 155 U. S. 117.

35.

Where all of the substantial evidence is as consistent with innocence as with guilt, the jury must acquit.

Turinetti v. U. S., 2 F. (2d) 15.

36.

Verbal admissions must be scrutinized with great care. It is the most dangerous kind of testimony. It is easily fabricated and at times difficult to disprove.

Tozer v. Hershey, 15 Minn. 257.

37.

The jury may also take into consideration the fact that the police officers did not make a written report of these alleged admissions.

38.

The program put in evidence by the People is not to be regarded as evidence against any of the defendants.

39.

The jury must disregard the evidence of the People's witness Harvey. There is no evidence in the case that these defendants or any of them had knowledge of the interpretations placed upon particular words by that witness.

40.

Words used in the play are to be construed in view of their context, only. They are not to be considered apart from what precedes or follows.

41.

Where a given set of facts is susceptible of an innocent as well as a guilty construction, the jury must accept the innocent construction; in other words, the jury must accept the moral rather than the immoral.

42.

The evidence of the People's witnesses as to alleged admissions by the defendants are not sufficient, in the absence of other credible evidence, to connect the defendants with the crime charged.

43.

It is the duty of the jury to scrutinize the evidence of the police officers, and to say whether or not the testimony of those persons acting as such officers, is biased, whether the interest they serve has influenced them to an extent that would reflect upon or affect their testimony.

State v. Boynton, 155 No.Car. 456.

44.

There is no evidence in this case that any of the defendants were degenerates nor is the question of the degeneracy of any of the defendants before the jury. The jury must presume that all the defendants, male and female, are normal human beings.

45.

There is no evidence that any act of sex degeneracy was performed on the stage of the Biltmore Theatre on the night of October 1st, 1928, by any of the defendants.

46.

There is no evidence that the subject of sex degeneracy was depicted or dealt with by any of the defendants.

47.

There is no evidence that any of the defendants were acquainted with the peculiar interpretation of words alleged to be in use among sex degenerates nor that they have ever associated or come in contact with or known the habits of such people.

48.

The mere portrayal or mimicking or burlesquing on the stage of male characters who speak in a high pitched voice

or walking with a swaying of the body is not of itself a dealing with or depicting of the subject of sex perversion or sex degeneracy.

49.

Unless you find beyond a reasonable doubt that an act was performed on the stage, by the defendants, which portrayed carnal intercourse between two males, you must acquit the defendants of the crime charged in the second count of the indictment.

50.

The defendant West is not responsible for, or chargeable with any acts, scenes, words or incidents which were not originated by her. In other words, if the particular words, acts, scenes, movements or incidents were uttered or performed by the actor by what is known as "ad lib", without regard to the author's creation, or if the particular words acts, scenes, movements or incidents were a part of the performer's own repertory and were not composed by the defendant West, she must be acquitted, unless the proof shows beyond a reasonable doubt that there were specific words or scenes composed by the said Mae West which are capable only of a guilty construction, having in mind that if there is any doubt as to the meaning of words, the construction most favorable to the defendant must be adopted.

51.

There is no evidence that defendant West personally directed this play.

52.

The mere fact that male actors played female parts on the stage, or walked in an effeminate manner or talked in a falsetto voice does not render them guilty of an unlawful act.

53.

The conversation of the scrub women at the opening of the first act is not obscene, indecent, immoral or impure nor does it tend to corrupt the morals of youth and others.

54.

The conversation following Stanley's entrance with one black shoe and one brown shoe, wherein McAllister says: "What is the idea of the different shoes?" and Stanley answers: "The woman lied to me; said there was nobody home", is not obscene, indecent, immoral or impure, nor does it tend to corrupt the morals of youth and others.

55.

In considering the evidence with relation to the following conversation detailed in the bill of particulars:

Stanley: "What kind of an act do you do?"

Howe: "Oh I get down on my knees; I am a female impersonator."

you must consider the fact that the evidence given by the people's witness on that point was conflicting, one testifying that the words "I sing Mammy Songs" were uttered as a part of Howe's speech on this occasion; the other testifying that no such words were uttered. You must also consider that the defendant's witnesses assert that the line "I sing Mammy songs" was the only line uttered on that occasion by the defendant Howe. If this testimony raises a reasonable

doubt in your mind, you must give the defendants the benefit of such doubt and remove from further consideration that part of the bill of particulars.

56.

These words are not obscene, indecent, immoral or impure and do not depict or deal with sex degeneracy or sex perversion.

57.

Even if those words were uttered as claimed by the people, I charge you that these words have an innocent construction and you must accept that construction and not place any sinister meaning or construction upon them.

58.

That item in the Bill of Particulars which describes four of the female actresses in the cast coming into the dressing room and taking off their street clothes and changing to their stage clothes is not obscene, indecent, immoral or impure.

59.

That item of the Bill of Particulars which depicts the incident with reference to the lampshades, does not deal with or depict sex degeneracy or sex perversion. There is no proof that there is anything sinister in talking about, handling or making of lampshades.

You must be satisfied beyond a reasonable doubt that the words "Why it is a convention" were uttered by Stanley upon the entrance of two male characters acting in an effeminate manner, and if you are not satisfied beyond a reasonable doubt that these words were uttered at that time by Stanley, or that these two characters acted in an effeminate manner, then you must dismiss from your consideration that particular charge.

Even if those words were uttered as claimed by the people, I charge you that these words have an innocent construction and you must accept that construction and not place any sinister meaning or construction upon them.

These words are not obscene, indecent, immoral or impure and do not depict or deal with sex degeneracy or sex perversion.

The charge of the Bill of Particulars is that the following conversation took place between Stanley and an unnamed male character acting in an effeminate manner:

Stanley: "hat are you? a Jolson?"

Unnamed character: "Jolson only sings on one knee; I sing on two knees."

If you are satisfied from the evidence that the character who uttered those lines was not an effeminate character or impersonating a female character, you must dismiss that from your consideration.

Even if these words were uttered as claimed by the people, I charge you that these words have an innocent construction and you must accept that construction and not place any sinister meaning or construction upon them.

These words are not obscene, indecent, immoral or impure and do not depict or deal with sex degeneracy or sex perversion.

63.

Any evidence that Alan Brooks, portraying the character of Rodney Terrell, made love to any of the women in the cast is not of itself obscene, indecent, immoral or impure and must be dismissed from your consideration in this case.

64.

The item in the Bill of Particulars which charges that Mrs. Hetherington, one of the characters said to her husband, indicating male characters walking and talking like women "I can't understand them, they are so queer" and Mr. Hetherington's reply, "Yes, they are queer", must be supported beyond a reasonable doubt and if you have any reasonable doubt that the word "queer" was used instead of the word "odd", you must give the benefit of such doubt to the defendants.

65.

I also charge you that neither the word "queer" nor the word "odd" have an obscene, indecent, immoral or impure meaning, nor does the use of the words depict or deal with sex degeneracy or sex perversion.

With reference to that item in the Bill of Particulars which charges the following conversation between two male unnamed characters acting in an effeminate manner;

> First female impersonator, "Did you ever have a chronic love affair?"
>
> Second ditto, "Yes, but his wife found it out."

there is conflict between the People's own witnesses as to whether "chronic" or "platonic" was used. Taking that into consideration, as well as the testimony of the defendants' witnesses denying that that conversation took place at all, it is for you to say whether or not there is a reasonable doubt in your mind regarding this item, and if there is such a doubt, you must resolve it in favor of the defendants.

Neither the expression, "Did you ever have a platonic love affair," nor "Did you ever have a chronic love affair", made under the circumstances alleged in the Bill of Particulars is obscene, indecent, immoral or impure nor does it depict sex degeneracy or sex perversion.

With reference to that item of the Bill of Particulars which alleges that Stanley touched one of the characters with a broom, said character thereupon giving a loud scream or whoop in a high voice like a woman, and leaping off into the wings, Officer Coy's testimony on that point was conflicting, his oral testimony differing with his alleged contemporaneous notes. Comparing that with the testimony of the defendants' witnesses, that Stanley hit said character violently with a broom and that there was no scream, I charge

you that if this creates a reasonable doubt in your minds as to what happened, you must resolve that doubt in favor of the defendants, and dismiss that item from your consideration.

Even if such an occurrence took place as above described, it is not of itself obscene, indecent, immoral or impure and does not depict or deal with sex degeneracy or sex perversion.

69.

With respect to the actions of the two acrobats, William Selig and Herman Lenzen, you must consider the fact that neither of the People's witnesses who attempted to describe that act mentioned in their notes any suggestive movements of Selig's head while in Lenzen's trousers nor that his head was in the vicinity of Lenzen's private parts. Since you saw these two defendants go through their act in the court room, it is for you to consider whether the act so presented to you was the same act as given upon the stage at the Biltmore Theatre on the night of October 1, 1928.

70.

The burden is on the People to prove beyond a reasonable doubt that the acrobatic act as portrayed in the court room was not the same as the act presented on the stage on October 1, 1928. If you are satisfied that the act as presented in the court room was not obscene, indecent, immoral or impure and did not depict or deal with sex degeneracy or sex perversion and if you are satisfied that this act was substantially the same as the act presented by these same defendants on the night of October 1, 1928, then you must dismiss this item from your consideration.

71.

As to that item of the Bill of Particulars which charges that four female impersonators who had just come off stage completing their act, stripped to the waist, and are attired in silk bloomers and silk stockings and are bare from the waist up with the exception that three of them wear brassiers around their chests, I charge you that that incident is neither obscene, indecent, immoral or impure and does not depict or deal with sex degeneracy or sex perversion.

72.

As to the charge in the Bill of Particulars that one of the female impersonators sat down and commenced to sew on a piece of white material, I call your attention to the fact that the People's evidence on that point is contradictory and conflicting.

73.

I charge you that that incident is not of itself obsceme, indecent, immoral or impure and does not depict or deal with sex degeneracy or sex perversion.

74.

As to the item in the Bill of Particulars which alleges that one of the defendants uttered the line "There ain't a dry seat in the house", I charge that it is not obscene, indecent, immoral or impure, nor does it deal with or depict sex degeneracy or sex perversion.

75.

I further charge you that inasmuch as there is con-

flicting testimony with reference to that statement, you must be convinced beyond a reasonable doubt that it was uttered and give the benefit of such doubt to the defendants.

76.

As to that item in the Bill of Particulars which alleges the talk about taking Lydia Pinkham's pills, I charge you that there was nothing obscene, indecent, immoral or impure in that remark and it did not deal with or depict sex degeneracy or sex perversion.

77.

I further charge you that you must take into consideration the context in connection with which this remark was uttered.

78.

I further charge you that that remark is not indecent, obscene, immoral or impure.

79.

As to that item in the Bill of Particulars which alleges that the actor Lester Sheehan invited a number of the players to a party given by the defendant Ed Hearn, called Toto in the play, there was nothing in that invitation which was obscene, indecent, immoral or impure, nor did it deal with or depict sex degeneracy or sex perversion.

80.

In that item of the Bill of Particulars wherein it is charged that one of the characters said to Stanley, "You are coming, aren't you dear?", I charge you that there was conflicting testimony about that between the People's witnesses, and that unless you find beyond a reasonable doubt that this line was uttered, you must acquit.

81.

I further charge you that the expression used was neither obscene, indecent, immoral or impure, nor did it deal with or depict sex degeneracy or sex perversion.

82.

That item of the Bill of Particulars wherein Stanley is alleged to say "Yes, if I don't die", placing his hand under his chin, I charge you that that statement and gesture are neither obscene, indecent, immoral or impure and does not deal with nor depict sex degeneracy or sex perversion.

83.

I charge you that the item in the Bill of Particulars which deals with the dialogue between Stanley and Hetherington wherein Stanley kicks Hetherington several times and says, "Now we get down to the meat", is neither obscene, indecent, immoral or impure.

84.

As to that item of the Bill of Particulars wherein it is claimed that there were a number of female impersonators in the dressing room, who when interrupted by Stanley,

screamed like frightened women, it is neither obscene, indecent, immoral or impure, nor does it deal with or depict sex degeneracy or sex perversion.

85.

I charge you that that item of the bill of particulars which describes a scene between Flo and Stanley in which Stanley says in substance, "Since you have been out to dinner with the pleasure man, I can speak freely with you", is neither obscene, indecent, immoral or impure.

86.

I charge you that the scene between Stanley and Flo in which he is alleged to caress and kiss her, is not obscene, indecent, immoral or impure.

87.

As to that item of the Bill of Particulars where Stanley is asked "What are you panting for, have you been running?" and he answers "That is passion", I charge you that is neither obscene, indecent, immoral or impure.

88.

I charge you that that item of the Bill of Particulars which describes the scene between Tirrell, the Pleasure Man, and Mary Ann, is neither obscene, indecent, immoral or impure.

89.

That item of the Bill of Particulars which depicts the scene between Augustin, Brooks and Howe at the end of the second act, is neither obscene, indecent, immoral or impure.

90.

That item of the Bill of Particulars which alleges that Howe makes the statement to Brooks "If you are a man, thank God I am a female impersonator", is neither obscene, indecent, immoral or impure, and does not deal with or depict sex degeneracy or sex perversion and you must particularly take into consideration the context showing that it was a speech of denunciation and was not meant to have any sinister meaning and you must dismiss it from your consideration.

91.

That item of the Bill of Particulars where Brooks goes to the dressing room and kisses defendant Campbell passionately, is not obscene, indecent, immoral or impure.

92.

As to that part of the Bill of Particulars which depicts the dancing between the dancers of the cast in the third act, you must bear in mind that the People's evidence is conflicting and that defendants allege that the women in the cast were dancing with the male characters and that the dancing did not deal with nor depict sex degeneracy or sex perversion.

93.

As to that part of the Bill of Particulars which describes defendant Hearn having on his silk Mandarin coat, I charge that that does not deal with nor depict sex degeneracy or sex perversion.

As to that part of the Bill of Particulars which charges defendant Ordway with having sung the song "I am the Queen of the Beaches" in such manner as to slur the last word, I charge you that the evidence of the People's witness on that point is conflicting and I further charge you in determining the manner in which the song was sung, you are to consider the words of the song and its subject-matter and the probability of whether or not the last word could be slurred, in view of the context of the song.

95.

As to the song about the moon, there is a conflict of evidence as to what song was sung. Moreover, I charge you that the title of the song contained nothing which was obscene, indecent, immoral or impure, or which deals with or depicts sex degeneracy or sex perversion.

96.

With respect to the item of the Bill of Particulars charging the singing of the song "Officer let me pat your horse, Isn't it coarse, My, hasn't it grown since June", you are to consider that none of the People's witnesses were able to remember any other lines of that song and that defendants deny that such a song was sung and that the line "Officer let me pat your horse" appeared in a song called "Get out and get under the moon". In this connection, you are to take into consideration the context of the song and if there is any dispute as to the meaning to be attached to the words used, that dispute is to be resolved in favor of the defendants. I further charge that these words are not

obscene, indecent, immoral or impure, nor does it deal with or depict sex degeneracy or sex perversion.

97.

Where the People's testimony is conflicting with reference to any particular item and the People's witnesses contradict each other or contradict themselves, and the defendants deny the acts, statements, movements or words alleged to be uttered or made at that time, a reasonable doubt in law is created by reason of such conflict and such contradictions and you must resolve that doubt in favor of the defendants.

98.

With respect to the dance numbers charged in the Bill of Particulars, there is nothing obscene, indecent, immoral or impure about them.

99.

With respect to the scene between Terrill and Dolores at Toto's home, the testimony as to the actual conversation is conflicting. I charge you that this is not obscene, indecent, immoral or impure.

100.

With respect to the final scene in connection with Terrill's death, the scene may be revolting or disgusting, but it does not excite lust. I, therefore, charge you that it is not obscene, indecent, immoral or impure.

101.

You are the sole judges of the facts in this case, and you are not to be influenced nor guided in judging the facts by the opinion of the court with respect to any of the facts as that may have been indicated to you, nor by any rulings which have been made by the court on this trial, and it is solely for you to judge the facts in this case.

102.

You may take into consideration the plays that have appeared on the New York stage for the past few years and the standard of theatrical productions and the popular taste with respect to plays, and you must bear in mind that in arriving at your conclusion you are to consider the language and action of the Pleasure Man in relation to modern theatrical standards and plays of the present day.

103.

You must disregard all rulings on motions which were made by the court. These relate to questions of law and are not within your province, and you are to draw no inference in favor of nor against either the People or the defendants.

104.

You are not to draw any inference, favorable or unfavorable, from the fact that any of the defendants failed to take the stand and testify.

You are not to draw any inference, favorable or unfavorable, from the fact that any of the defendants failed to appear in court.

You are to consider that the disrobing of female impersonators took place after they had completed their act. Unless you are convinced beyond a reasonable doubt that such clothing was not the usual apparel of normal female impersonators, you must disregard this incident

The defendants must be acquitted unless the jury find beyond a reasonable doubt that the defendants knew the peculiar meaning attributed by the people to words in popular use as charged

There is no evidence that the defendant West directed any rehearsals or the presentation of the play

Not proficient

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37

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14	30	103

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39, 40, 41, 42, ~~45~~ 46, 47 48
49, 50, 51 53, 54, ~~56~~ 55, 57 — 96

[illegible] 99, 100, 102,

AGREEMENT made this 21st day of November, 1928, between such of the owners and stockholders (hereinafter called "Stockholders") of shares of stock of LESSER-WARNER PRODUCINC CORPORATION, a New York corporation , (hereinafter called the "Company") as shall become parties hereto in the manner hereinafter provided, the parties of the first part, SOL LESSER and FRANK WARNER, the survivor and successors of them jointly as voting trustees (hereinafter called the "Trustees"), parties of the second part.

WHEREAS, the Stockholders deem it for the best interests of themselves and of the Company to act together concerning the management of the Company, and to that end to unite for a definite period of time certain voting and other powers and rights held by them as stockholders of the Company, and to place such rights and powers in the hands of the Trustees, as hereinafter provided:

NOW, THEREFORE, in consideration of the premises, of the mutual covenants herein contained, and of the sum of one dollar by each of the parties to the others in hand paid, the receipt whereof is hereby acknowledged, THIS AGREEMENT WITNESSETH:

1. The Stockholders hereby severally agree to assign, transfer and deliver to the Trustees such shares of the stock of the Company and the certificates therefor as may from time to time during the term of this agreement stand registered on the books of the Company in the names of such Stockholders, as well as all other shares of stock and rights to receive them that they or any of them may own, hold or be entitled to receive, such shares to be held by the Trustees, together with such other shares as may hereafter from time to time be delivered hereunder by any such Stockholder of the Company, and to be disposed of by the Trustees under and pursuant to the terms and conditions of this agreement.

2. The Trustees hereby promise and agree with the Stockholders individually that the Trustees willissue or cause to be issued to or upon the order of each Stockholder, in exchange for the certificates for shares of the stock of the Company assigned, transferred and delivered by him to the Trustees, a voting trust certificate or certificates, calling for shares, to the amount so delivered, in substantially the form following:

(FORM OF VOTING TRUST CERTIFICATE)

LESSER-WARNER PRODUCING CORPORATION.

VOTING TRUST CERTIFICATE.

THIS IS TO CERTIFY that on November 21st, 1938, or at the earlier termination of the agreement hereinafter referred to, , or registered assigns, will be entitled to receive, as hereinafter provided, a certificate or certificates for shares expressed, to be fully paid of the stock of LESSER-WARNER PRODUCING CORPORATION, a New York corporation, having no par or nominal value,

and in the meantime to receive payments equal to the amount of dividends, if any, collected by the undersigned Voting Trustees or their successors upon a like number of such shares of stock of said Company transferred to said Voting Trustees under and pursuant to the terms and conditions of a certain agreement dated November 21st, 1928, by and between the Stockholders of said Company and said Voting Trustees, and until November 21st, 1938, or until the prior termination of said agreement, said Voting Trustees or their successors shall possess and be entitled to exercise all rights of stockholders of every name and nature, including the right to vote and to give or execute consents, waivers, proxies, etc. in every respect of any and all such stock, it being expressly stipulated that no voting right of any kind or right to give or execute consents, waivers, proxies, etc., passes to the holder thereof, or his assigns, by or under this certificate, or by or under any agreement expressed or implied.

This certificate is issued under and pursuant to, and the rights of the registered holders hereof, are subject to and limited by the terms and conditions of the aforesaid agreement, which is on file with the Voting Trustees, and a duplicate of which agreement is on file in the principal office of the Company.

Subject to the provisions contained in the clauses immediately following this clause, the certificate and the right, title and interest in and to the shares in respect of which this certificate is issued, are transferrable only on the books of the Voting Trustees by the registered holder hereof, in person or by attorney duly authorized, according to the rules established for the purpose by said Voting Trustees, upon surrender hereof properly assigned, and until so transferred said Voting Trustees may treat the registered holder as owner hereof for all purposes whatsoever, except that no delivery of certificates of stock hereunder shall be made without the surrender hereof.

This certificate and the right, title and interest in and to the shares in respect to which this certificate is issued shall not be assigned, transferred, sold or otherwise disposed of excepting only in the manner hereinafter set forth and subject to the conditions hereinafter contained:

The holder of this certificate shall give notice of his desire to sell, transfer, assign or otherwise dispose of this certificate to each of the other holders of similar certificates issued in pursuance of said voting trust agreement, by written notice sent by registered mail to the respective addresses registered with the Voting Trustees.

Each and all of such remaining stockholders shall have the right to purchase this certificate and the shares represented thereby, at a fair appraised value to be fixed by three appraisers, one to be appointed by the holder of this certificate, the other to be appointed by the remaining certificate holder or holders desiring to purchase this certificate, and the third to be designated by agreement between the first two above mentioned appointed appraisers. In the event of the inability of the two to agree upon such third

appraiser, such third appraiser shall be appointed upon application of either party or group of parties (to such sale, assignment or transfer) to the Supreme Court of the State of New York, Appellate Division, First Department, to the judges thereof in the order of their seniority.

The affirmative decision of at least two of said three appraisers shall be binding, final and conclusive upon all parties to such appraisal.

The option to buy shall be effective for a period of one year from the date of the giving of the above aforementioned notice by the holder hereof, and the party or parties desiring to purchase shall pay the purchase price within thirty days after the fixing of the price to be paid therefor. In case there shall be more than one party (entitled to purchase this certificate and the shares represented thereby) who shall exercise such option, then this certificate and the shares represented thereby shall be purchased by such parties pro-rata in accordance with their respective holdings of stock represented by voting trust certificates issued in pursuance of this voting trust.

In case any party entitled to exercise such option shall not exercise the same within the said one year period, then this certificate and the right, title and interest in and to the shares in respect to which this certificate is issued shall be freed and released from the restrictions herein contained.

The holder of this certificate, by the acceptance hereof, agrees not to mortgage, hypothecate or otherwise encumber this certificate, and this certificate cannot be mortgaged, hypothecated or otherwise encumbered.

IN WITNESS WHEREOF, said Voting Trustees, by one of their number or by their agent, have executed this certificate this 21st day of November, 1928.

.....

.....
Voting Trustees

FOR VALUE RECEIVED hereby sell, assign, and transfer unto the interest in the shares of stock represented by the within certificate, and do hereby irrevocably constitute and appoint attorney to transfer such interest in said certificate on the books of the within named Voting Trustees, or their successors, with full power of substitution in the premises.

Dated , 192 .

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In presence of

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3. The trustees shall execute any or all of said voting trust certificates by their joint signatures and the said certificates of stock shall be deposited with the trustees jointly who shall act as depositary and who may at any time designate another depositary or agent with whom said certificates of stock shall be deposited.

4. The right, title and interest in and to the shares represented by any voting trust certificate issued hereunder may be transferred on the books of the Trustees, upon surrender of such certificate properly assigned by the registered holder thereof, in person or by attorney duly authorized, according to the rules established for that purpose by the Trustees. The Trustees shall not be obliged to recognize, nor shall they be liable for not recognizing, any person as the owner of any voting trust certificate issued hereunder other than the person in whose name the same shall be registered on their books, subject to the restrictions and limitations as to sale, assignment, transfer or other disposition as contained in the voting trust certificate described in Article "2" of this agreement.

5. The Trustees may cause all shares of the stock of the Company deposited with them hereunder to be transferred on the books of the Company, either in to their individual names as Voting Trustees under this agreement, or, in their discretion, into the name of "Voting Trustees under Agreement of November 21st, 1928." The Trustees are authorized and empowered to cause any further transfers of said shares to be made which may become necessary through the occurrence of any change of persons holding the office of Voting Trust-

ees, as hereinafter provided.

6. From time to time hereafter during the term of this agreement the Trustees will receive such additional certificates for fully-paid shares of stock of the Company as any or all stockholders of the Company may tender and deliver to them, subject to the terms and conditions hereof, and in exchange for such certificates will issue and deliver voting trust certificates, as hereinbefore provided.

7. During the term of this agreement, the trustees shall possess and be entitled to exercise all the rights of stockholders of every name and nature including the right to vote and to give or execute consents, waivers, proxies, etc., in every respect of any and all such shares of the stock of the company as may be deposited with them hereunder including particularly the right to vote the said stock in favor of (1) the sale of the entire assets of the Corporation or any part thereof for such consideration payable in cash, securities or property as they in their discretion may determine, provided they shall first have had and obtained the affirmative vote or the consent in writing of the record holders of not less than 75% of the issued and outstanding capital stock of the said company; (2) the creation of bonded or other indebtedness secured by a mortgage or other lien on all ~~or~~ any part of the property or assets of the company; (3) the liquidation of the business whenever in the opinion of the voting trustees conditions are such as to make it unwise to continue the same.

They shall also possess the power and be entitled to nominate, elect and appoint directors in the following manner: Sol Lesser, during the continuance of this agreement, shall have the right and power to nominate two (2) directors of and for the Company; and Frank Warner, during the continuance of this agreement, shall have the right and power to nominate two (2) directors of and for the Company. Nothing in this clause shall prevent the said Trustees, should they so desire, from nominating themselves as a member or members of the Board of Directors.

In case of the death or physical disability of Sol Lesser and/or Frank Warner during the term of this agreement, a successor trustee for such respective person shall be a person designated by the executor, administrator or committee (as the case may be) of the person so dying or physically disabled, and such successor shall continue for the full balance of the term of this agreement with the same full force and effect as if his name were herein originally specified in lieu and in place of the person so dying or physically disabled.

All nominations shall be made in writing and delivered by the voting trustee making said nomination or nominations to the other voting trustee at least five days before any annual meeting of the stockholders of the said company and/or before any special meeting called for the purpose of electing a director or directors of the said company.

The Trustees, for themselves and their successors in

the trust, covenant and agree that they will pay, or cause to be paid to or upon the written order of the registered holders from time to time of the voting trust certificates issued hereunder, their proportionate amounts of any dividends collected by the Trustees or their successors upon the shares of such stock deposited hereunder, and for the purpose of making any such payment or for any other purpose, the Trustees may, in their discretion, order their transfer books closed for such period or periods of time as to them shall seem proper; except in the matter of the nomination of directors as above provided all acts or action of the voting trustees shall be performed only after the affirmative vote of both trustees and to perform any other act it shall require the joint action of both trustees.

8. The Trustees are specifically authorized, in the exercise of their unrestricted discretion, in respect of any and all stock of the Company subject to this agreement, to vote for or to consent to any increase of the stock of the Company that lawfully may be submitted for action by the stockholders. In case any increased stock of the Company shall be offered to the stockholders for subscription, then, in such case, upon receiving from the holder of any voting trust certificate, prior to the time limited by the Company for subscription, and payment, a written request to subscribe in his behalf and the money required to pay for a stated amount of such increased stock(not in excess of the ratable amount subscribable in respect of the stock represented by such voting trust certificate), the Trustees will make such subscription and payment, and upon receiving from the Company certificates for the stock so subscribed for, will issue voting trust certificates in respect thereof to the voting trust certificate holder who shall have made such request and payment.

9. In case the Trustees shall receive any stock of the Company issued by way of dividends upon stock held by them hereunder, the Trustees shall hold such stock and the certificates representing the same likewise subject to the terms hereof, and shall issue voting trust certificates representing such stock dividend to the respective registered holders of the then outstanding voting trust certificates entitled to such dividend.

10. In voting upon the shares of the stock of the Company held by them, the Trustees will exercise their best judgment from time to time, but it is expressly understood and agreed that no Trustees incur any personal liability or responsibility by reason or any error or judgment or of law or of any matter or thing done or omitted to be done under this agre ment or in the management of the affairs of the Company or otherwise except for his own individual wilful misconduct. Neither of the trustees as depositary or any other depositary who may from time to time be designated by them to act as such, shall incur any personal or other liability or responsibility whatever except for his, their or its own individual wilful misconduct.

11. This agreement shall continue in force until

November 21st, 1938, or until the prior termination hereof. The Trustees at any time prior to November 21st, 1938,may in their discretion, if they shall both in writing agree, terminate this agreement upon five days' notice in writing to the registered holders of the voting trust certificates. Upon the termination of this agreement, the Trustees, in exchange for and upon surrender of the voting trust certificates then outstanding and issued hereunder, will in accordance with the terms hereof, deliver or cause to be delivered to the registered holders of such voting trust certificates, certificates representing shares of the stock of the Company to an amount equal to the number of such shares of the stock of the Company deposited hereunder and represented by such voting trust certificates. In case upon or after the termination of this agreement the Trustees shall deposit with the Company stock certificates held by them, properly assigned in blank for transfer, representing the number of shares of stock of the Company called for by the voting trust certificates then outstanding, with written authority to the Company to deliver said stock certificates, or new certificates in lieu thereof, when and as said voting trust certificate shall be surrendered for exchange as herein provided, then all further liability of the Trustees, or either of them, for the delivery of stock certificates in exchange for voting trust certificates, shall cease and determine.

12. Except as hereinbefore provided the Trustees must act for all purposes jointly, in writing, signed by both of them, and no action shall be taken or be caused to be taken by the Trustees hereunder, except by or with the vote in writing as aforesaid, of both of those at the time acting as Trustees, but the Trustees may act without a meeting upon the written consent of both of the Trustees.

13. The Trustees shall keep a record of all their proceedings and may adopt their own rules of procedure, They may delegate to a proxy, or proxies, the right to vote and act for them at any and all meetings of the stockholders of the Company, with or without power of susbstitution, as they may in their own absolute discretion determine. The trustees may serve as officers or directors of the Company and may vote or cause votes to be cast, in favor of their own election as such officers or directors. They may appoint and employ such agents and attorneys as in their discretion may be convenient and advisable in the administration and execution of their powers and duties hereunder or any of them and may remove them at pleasure.

14. In the event of any vacancy and the appointment of a successor to either Trustee, as herein provided, all the rights, powers and duties of such Trustee shall at once pass to and devolve upon his successor of the stockholders of the said Company.

15. The Trustees hereunder and their successors may be parties to this agreement as Stockholders, and to the extent of the stock which may be deposited by them, they shall in all respects be entitled to the same rights and benefits hereunder as other Stockholders who may become parties hereto, and they may, as individuals, be and continue to be stockholders of the Company, and/or holders of voting trust certificates or otherwise interested in the purchase or sale of its shares or the property owned by it.

16. Any stockholder of the Company may adopt this agreement and become a party hereto and acquire all of the rights and benefits of a depositor of stock hereunder by depositing his certificates for shares of stock of the Company with the Trustees to be held for the purposes and subject to the terms hereof. Such deposit or the acceptance by any stockholder who shall so deposit any certificates for shares of the stock of the Company, of voting trust certificates issued hereunder, shall, without further act on his part, bind such stockholder, his representatives and assigns, as a party hereto, but, nevertheless, upon the request of the Trustees, any such stockholder shall sign this agreement in duplicate. 232

17. The Trustees hereby accept and agree to perform the duties and trusts herein imposed, subject to all the terms, conditions and reservations herein contained, and agree that they will exercise the powers and perform the duties of trustees as herein set forth, provided, however, that nothing in this paragraph contained shall be construed to prevent either of the Trustees from resigning and discharging himself at any time from the trusts aforesaid.

18. The fact that particular powers are by this agreement given to the voting trustees herein, shall in no way be deemed to limit nor is anything herein intended to limit the general powers of the voting trustees hereunder.

19. An original of this agreement shall be kept on file with the Trustees and a duplicate hereof shall be filed with the Company at its principal place of business in the State of New York, and such duplicate shall be open to the inspection of any stockholder of the Company daily during business hours. No holder of a voting trust certificate issued hereunder, or any other person shall, however, have the right, except with the prior consent of the Trustees, to be given or withheld in their own absolute discretion, to examine the list of holders of such voting trust certificates, or the transfer books of the Trustees.

20. The term "Trustees" or "Voting Trustees" whenever used herein, refers, unless otherwise indicated to the contrary, to the Trustees at the time acting as such hereunder, and the expression "successors" or "successors in the Trust", or any other equivalent term, shall be taken to include not only the successors of the Trustees named herein, but also any successor or successors of any such successor Trustees or Trustee.

This agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, and all of which taken together shall constitute but one and the same instrument.

IN WITNESS WHEREOF, this agreement is executed in

duplicate as of the day and year first above written.

In the presence of

Sol Lesser

Frank Hasel

Voting Trustees

Sol Lesser

Frank Hasel

Stockholders

McIntyre, J. People v Weinberger

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Gentlemen of the jury: At the outset I desire to thank you for the assiduity which you have shown during this trial and the patience which was manifested by you in listening to the testimony. I appreciate, too, that the trial has been fatiguing and that many days have been spent by you in listening to the facts that have been developed.

This case is a criminal case and it comes into this Court in virtue of an indictment laid by the Grand Jury of this County charging these defendants with a vidation of a law mentioned and described in the Penal Law of the State of New York.

The trial of a criminal case is divided into two parts, the facts are with this jury, the law that governs and controls the case is entirely with the Court. As you sit here to-day, as jurors, to determine the question of fact in this case you are just as important in the administration of the criminal law of our State as I am, for without your conscientious and hearty co-operation there could be no administration of the criminal law in the State of New York.

You are to judge this case impartially and fairly. You are to approach the consideration of all the evidence with an unbiased mind and after having looked into all that which has been testified to it will be for you to say whether these defendants are guilty or not of the crime charged in the indictment.

The law obligates me to say to you that these defendants are presumed to be innocent until their guilt has been established, by proof beyond a reasonable doubt. When that is done, that is to say, guilt is established beyond a reasonable doubt the presumption of innocence falls, it is

destroyed. One more thing I wish to say to you is that you are the sole and exclusive judges of the facts in this case. No one else can determine the facts in a trial of this nature but you as jurors sworn to try the issues of fact involved.

These defendants are being prosecuted by the People of the State of New York under Section 1140A of the Penal Law of our State. Later, I will call your attention to the provisions of the section to which I have just made reference

The theory of the prosecution is that at a certain building or theatre known as the Apollo Theatre in the City and County of New York the defendants mentioned in the indictment on the 19th day of February, 1923, and continuing down to the date of the indictment, to wit, on or about the 6th day of March, 1923, did unlawfully advertise, give and participate in an obscene, immoral and impure drama, play, exhibition and entertainment entitled "The God of Vengeance." That which I have just mentioned is the theory of the State in this case. The defendants now arraigned contend that the drama about which testimony has been given was not indecent or immoral within the meaning of the Statute; that in other words, the play to which reference has been made taught a moral lesson and in no wise offended against the law described in section 1140A of the Penal Law.

I will call your attention now to the law which is as follows--I read it from the Statute:

> "Any person who as owner, manager, director, agent or in any other capacity prepares, advertises, gives, presents or participates in any obscene, indecent, immoral or impure drama, play, exhibition, show or entertainment which may tend to the corruption of the morals of youth or of others; and every person aiding and abetting such an act and every owner, lessee or manager of any garden, building, room, place or structure who leases or lets the same or permits the same to be used for the purpose of any such drama, play, exhibition, show or entertainment or knowingly assents

to the use of the same, any such person shall be guilty of a misdemeanor."

That, gentlemen, is the law in this case, which will govern you in your deliberations when you come to analyze the facts that have been established by the proof.

Let me ask you at this time to bear well in mind the law to which I have just addressed your attention. You will remember, as I read the statute that the words immoral and indecent are to be found in it. The word immoral as used in the statute means licentious, dissolute and malicious. The word obscene, as used in the Statute, means smutty, lewd, indecent and immoral. Be good enough, to bear in mind the definition that I have given you concerning the particular words mentioned in the Statute.

The question of fact in this case is entirely with you. It will be for you to say, from the evidence, whether or not these defendants did the acts or used the words forbidden by the Statute or both. It is for you to say, from the the evidence, whether or not the acts referred to or the lines used in the performance were obscene, indecent or immoral and that the whole show, taken together, presented an impure drama, play, exhibition, show or entertainment which would tend to the corruption of youth or others. In a case of this kind it is the law that persons aiding or abetting, by that meaning the actors in such show or drama, knowingly, are guilty of the crime defined by the Court.

Now I wish to say to you, in addition, that the play, said to have been performed at the Apollo Theatre at the time mentioned in the indictment, must be judged as a whole.

The evidence must be reviewed by you as a whole. The play in this case is to be judged as a whole and not by isolated phrases or remarks. You must review all of the evidence, in other words, the whole play, not review only such parts as may be said to amount to obscenity or lewdness. I say to you once more that the play is to be judged not by isolated remarks but by the whole play. The play is not to be judged from a selection of language employed by the actors but by all the language, discussions and incidents arising in the course of the performance. In other words, I wish to say that the play in question and under review here must speak for itself as a whole.

Every reasonable doubt arising in this case, if any there be, should be resolved in favor of the defendant.

Was the play introduced into evidence here such as to bring it within the condemnation of the Statute to which I have recently addressed your attention? It will be for you to say whether it comes within the condemnation of the Statute. If you find, as a fact, that the play was obscene, indecent, immoral or impure and that it tended to the corruption of the morals of youth or other people, and you believe that beyond a reasonable doubt based upon the evidence in this case you may find these defendants guilty, that is every person aiding or abetting in its performance.

In addition to what I have already said I wish to say that discussions or dialogues offensive to public decency or having a depraved tendency are not privileged. A play is indecent which is unbecoming, immodest and unfit to be seen, and even though a moral lesson is taught or said to be taught as claimed in this case it cannot be done by employing and using unfit and improper language amounting

to obscenity and indecency which would tend to the corruption of the morals of youth or other persons. In other words, if a moral lesson is sought to be taught in language that is indecent, indicating obscenity or immorality by word or act the fact that it is done with a view to teaching a moral lesson would not be an excuse. Bear that in mind.

As I said at the outset you are the sole judges concerning the evidence. Was this play at the time that it was portrayed in the Apollo Theatre offensive, indecant, immoral or impure? Was it impure drama and did it tend to the corruption of the morals of youth or other persons? That, in substance, is the question that you are called upon to answer in this case. If you find from the evidence that the play produced at the times mentioned was indecent, immoral and amounted to impure drama and you believe the evidence bearing upon that side of the case beyond a reasonable doubt, once more I say to you that you may find these defendants guilty of the charge laid against them in this case.

The People of the State of New York are anxious to have pure drama. We are anxious to have decent plays. We are opposed to immoral and indecent productions and the law governing this case to which I have addressed your attention a little while ago is violated if obscenity, impurity or indecency is done upon the stage. Was this play, as produced at the time mentioned in the evidence, obscene, immoral, impure? That question must be decided by you.

The fact that an indictment has been found against these defendants carries with it no presumption of guilt. The People are required to establish the guilt of these de-

fendants by evidence convincing you of their guilt beyond a reasonable doubt before there can be a conviction. Every one who participates as a performer on the stage in an immoral, obscene, indecent show is guilty.

This case, gentlemen, is highly important. It is important to the People of the State of New York. It is important also to the defendants who are now arraigned. Decency and morality should be upheld and any one who violates good morals, who disregards decency, who portrays obscenity may be regarded by you as guilty.

You will take this case, examine it carefully, go through all the lines that have been testified to as having been uttered upon the stage at the Apollo Theatre, look into all the situations that arose in the course of the play and everything incident to the play that has been testified to. All those matters you have a right to consider when you come to determine the question of guilt or innocence.

There was, in the course of the evidence, and it will be for you to say whether it be true or not, a situation where it appeared that two females in the second act did things that would indicate lechery and lasciviousness-- that being the contention of the prosecution. In other words, the District Attorney would have you draw from the evidence in that respect that has been adduced that there was a suggestion amounting to that which is called homo sexualis. It will be for you to say when you come to examine that branch of this case whether the conduct of these two females on the occasion when they appeared upon the stage in the second act did present such a situation as to allow the inference to be drawn that their purpose was impure, indecent, lascivious and immoral. That will be a question for you

to determine. As I said before, even though it may be contended by the defendants in this case that they were seeking to teach some moral lesson, a moral lesson can only be taught by decency. It cannot be taught by the employment of lines and words, conduct and acts that might amount to impure drama or obscenity.

Now that which occurred in the past as has been mentioned in the course of the summation of the learned gentleman who presented this case for the defense furnishes no defense here. That which was said by distinguished personages in that period of English literature known as the Elizabethan times furnishes no defense here. And because Shakespeare saw fit to write, as counsel for the defendant has stated, in a manner which might be characterized as salacious literature conveying impure thoughts furnishes no defense to the accusation made against these defendants. The only question here to be determined from the evidence introduced is: Did this play, at the time mentioned in the indictment, offend the Statute, violate the law as read by me in the early part of may charge? That is the question, gentlemen, for you to determine in this case.

It was said, among other things, that these defendants may be, in the event of a conviction, sent to jail. You have nothing whatever to do with that. The penalty that might be visited upon these defendants, in the event of a conviction, you have nothing to do with. The Court has a very vast discretion in a case of this character. It is true upon a conviction they may be sent to prison, and it can be said, too, that the Court has power to impose a fine only or to suspend sentence. So you must not be influenced by that

which was said in the course of the summation that these defendants might be sent to jail because if you take that into consideration, when you are determining the evidence which has been introduced or permit your judgment on the evidence to be influenced simply because of some penalty that might follow, then you vidate your oaths as jurors. you are here only to try the naked question of fact and none other. You are not to be influenced or affected by what might happen in the event of a conviction.

Upon the whole case the defendants are entitled to the benefit of any reasonable doubt arising from the evidence. You are not permitted, gentlemen of the jury, to go outside of the record in this case to find a reasonable doubt. A reasonable doubt, as contemplated by the law, must spring from the evidence. If you have a reasonable doubt arising out of the evidence adduced here that reasonable doubt becomes the property of the defendants, and they are entitled to an acquittal at your hands. A reasonable doubt is not a guess or a surmise; it is not a caprice. A reasonable doubt must be based upon the evidence adduced in the case. A reasonable doubt must not be resorted to by a jury as a subterfuge to escape the performance of an unpleasant duty. As I have told you before these accused persons are entitled to the benefit of every reasonable doubt. You have a right to examine all of the evidence in order to determine whether there is a reasonable doubt of their guilt in this case. A reasonable doubt does not mean that the State must establish, by proof, the facts beyond all doubt, beyond all imaginary doubt. A reasonable doubt means just what the words themselves mean in their every day import and signification. The State is required to establish the guilt of

these defendants beyond a reasonable doubt, not beyond an imaginary doubt, simply beyond a reasonable doubt. And when that is done you will be justified in finding the defendants guilty. But if the State fails to convince you of their guilt beyond a reasonable doubt then it becomes your duty to acquit them of the charge laid in the indictment.

A number of witnesses were called by the defense. You will remember that I excluded the testimony that they sought to bring out. You cannot guess at what they might have testified to had they been permitted to testify because that which the defendants endeavored to establish was held by me to be incompetent. Therefore, you must not be affected or influenced in the slightest degree by their presence or by what you may now think they would have testified to had they been permitted to testify. You are to be governed, as I said before, and as I will say now in conclusion, only by the evidence which was received in this case. Bear in mind, gentlemen, that this case is important, as I said a little while ago, to the People of the State of New York, and it is important also to these defendants that they should be tried fairly, judged fairly and a verdict rendered which is consistent with the evidence. They should not be judged by any bias or prejudice. Their calling in life should not be regarded as against them in the slightest degree. They pursue what is called an artistic calling. The drama is not the highest of the arts. I think literateurs of the world will say that it is the lowest of the arts, but nevertheless they are entitled to a fair and impartial trial upon the evidence which has been adduced. You take this case, gentlemen of the jury, and exercise your own good judgment and intelligence. Deal with it as twelve sensible men would deal with any pro-

position in life. If you feel upon the whole case that the guilt of these defendants has been established beyond a reasonable doubt do not hesitate to say so. If, on the other hand, you feel that the People have failed to establish their guilt beyond a reasonable doubt in accordance with the rules that I have laid down for your guidance you will say so by your verdict.

Your verdict in this case will be guilty or not guilty.

These defendants are not being tried for the commission of a felony. They are now being tried for what is said to be a misdemeanor. You may now retire and state by your verdict whether under the evidence in this case, the defendants are guilty or not guilty of the accusation laid against them in the indictment.

Mr. Weinberger: I except to that part of your Honor's charge in which you instruct the jury that they may draw inferences from any part of the play, and I ask your Honor to charge the jury that they must consider the evidence as an entire play, judge the play in its entirety and that they cannot draw any inference from any part of it.

The Court: Did I not say that? I was careful to say that.

Mr. Weinberger: I have my notes on that.

The Court: That is what I said, that they must judge the play as a whole and not in part.

Mr. Weinberger: I think your Honor, perhaps, did say that, but in the latterpart of your charge you did make that statement and if your Honor did not, why I will withdraw the request.

The Court: What is your request?

Mr. Weinberger: Merely that they cannot draw an inference from any part of the play, but as your Honor stated in the early part of your charge, they must judge the play in its entirety.

The Court: As a whole.

Mr. Weinberger: Your Honor charged the jury that a moral lesson cannot be taught by lines, words or conduct that might amount to impure drama or obscenity. I except to that part of the charge and I ask your Honor to instruct the jury that they must take as your Honor stated in the first part of your charge, the entire play, and then if they should be of the opinion that certain words or even actions in the play are indecent, that that does not necessarily make the entire play obscene and indecent which would tend to the corruption of the morals of youth or others.

The Court: Well, suppose that there was revolting conduct on the stage between two people or that there was actual physical meretricious relations performed in the presence of the audience--is it your contention that that would teach a moral lesson, and, therefore, would be an excuse?

Mr. Weinberger: That is not my contention. I except to your Honor's refusal to charge as requested and I would ask your Honor to instruct the jury that it is not your opinion that governs, that they must make up their minds from the questions of fact.

The Court: I stated that to the jury many times. Once more I will say that I have no opinion. I am not, under the law, entitled to have an opinion. You are to form the opinion.

Mr. Weinberger: I ask your Honor to charge that if the jury should be in doubt as to the guilt or innocence of either of the defendants, that it is their duty to find the defendants innocent unless they are of the opinion that the District Attorney has proved the defendants' guilt beyond all reasonable doubt.

The Court: I so charge.

Mr. Weinberger: I except to your Honor's statement in your direct charge, that that which was said by the distinguished personages in Elizabethan times furnishes no defense here and because Shakespeare saw fit to write, as counsel for the defendants stated, in a manner that might be said to be salacious literature, furnishes no defense in the present case. I except to your Honor's remarks in that respect, and I ask your Honor to instruct the jury that if they believe that the presentation of this play was proper and that past literature and past drama presented it also in the same proper manner, the fact that one of the scenes is laid in a brothel is not sufficient to have them find the defendants guilty, and that they can take into consideration past literature or drama.

The Court: I decline to charge that.

Mr. Weinberger: I respectfully except. I respectfully ask your Honor to charge the jury that they must take into consideration the intent with which the play was done and if there was no criminal intent on the part of the defendants to violate the Statute they must be acquitted.

The Cart: I will say to you, gentlemen, that intent may be gathered from all the surrounding circumstances.

Mr. Weinberger: I ask your Honor to charge the jury

that they must only consider the entire play and must not consider isolated parts, whether of language or action on the stage, unless they are of the opinion that any isolated language or action on the stage makes the entire play obscene, immoral and indecent which would tend to corruption of youth and others.

The Court: I have said that several times.

Mr. Weinberger: I take an exception to your Honor not charging it at this time. I ask your Honor to charge that as a matter of fact the play need not point a moral.

The Court: I so charge.

Mr. Weinberger: I ask your Honor to charge that even though it talks of brothels, and shows a brothel, that of itself is not a violation of law.

The Court: I so charge.

Mr. Weinberger: I ask your Honor to charge that the play must not only be obscene, indecent, immoral or impure drama, but it must in addition be one that would tend to the corruption of the morals of youth and others.

The Court: I so charge.

Mr. Weinberger: I ask your Honor to charge that where a given set of facts are susceptible of an innocent as well as a guilty construction, the jury must accept the innocent construction.

The Court: In other words, you must accept the moral rather than the immoral. I so charge.

Mr. Weinberger: I ask your Honor to charge the jury that if the play in the jury's opinion is literary as distinct from the pornographic, they must acquit. If the

jury is of the opinion that this is a real drama portraying life and its lessons, and not a mere pornographic show for the purpose of exciting sex and lust, they must acquit.

The Court: The word pornographic pertains to obscene literature. It is a word derived from the Greek. That applies to books particularly and not to scenes enacted in a play.

Mr. Weinberger: I respectfully except to your Honor's refusal to charge, and I again ask your Honor to charge that if in the opinion of this jury this is real drama portraying life and its lessons and not a mere pornographic show for the purpose of exciting sex lust they must acquit.

The Court: I so charge.

Mr. Weinberger: I ask your Honor to charge that the Statute in question is directed against lewd, lascivious and salacious or obscene plays the tendency of which is to excite lustful and lecherous desires, and if the jury is of the opinion that this play has not the tendency to excite lustful and lecherous desires they must acquit.

The Court: I refuse to charge in that language except as I have already charged.

Mr. Weinberger: Exception. I ask your Honor to charge that the jury should be instructed that even if a book or a play does not teach a moral lesson the jury must find that it is not a violation of law if it does not tend to the excitation of lustful and lecherous desires.

The Court: In substance I will say that is correct law, though it is not the language of the statute.

Mr. Weinberger: I take an exception. I ask your Honor to charge that even though this play is a play of the

underworld, or the seamy side of life, that does not make it a violation of the law.

The Court: Do you contend that this is a play of the underworld?

Mr. Weinberger: In a sense there is a brothel and there are brothelkeepers, and to that extent we claim that it is a play of the underworld.

The Court: If it is simply a play of the underworld and only amounts to that without immorality, indecency or obscenity, why, the counsel for the defendants is correct.

Mr. Weinberger: I ask your Honor to charge that the jury must be convinced beyond a reasonable doubt that this play would tend to corruption of the morals of youth or others, and if they are not conveinced beyond a reasonable doubt that the play would have that tendency they must acquit.

The Court: I so charge.

Mr. Weinberger: I ask your Honor to charge that even if every act of the play was in a brothel unless the play as a whole tended to excite lustful and lechorous desires beyond a reasonable doubt it would not be a violation of the law.

The Court: If only a brothel scene appeared in this play I would say that that would not come within the statute and that the defendant should not be convicted.

Mr. Weinberger: Exception. I ask your Honor to charge that even if the jury should be convinced that any one part of the business or the language may be considered obscene, immoral or indecent, yet if the entire play points a moral they must acquit.

The Court: I so charge.

Mr. Weinberger: I ask your Honor to charge the jury that even if the jury should happen to be convinced that one part of the business or the language on the stage might be considered obscene, immoral or indecent that if the entire play points/a moral they must acquit.

The Court: I refuse to charge in that language.

Exception.

Mr. Weinberger: I ask your Honor to charge that even though a seeker after the sensual and degrading parts of a play may find in some part of this play something to satisfy his pruriency that it is not sufficient for the jury to convict.

The Court: Now you want them to take excerpts.

Mr. Weinberger: No.

The Court: As I said before, a play must be judged as a whole in order to determine whether it comes within the prohibition of the statute.

Mr. Weinberger: I respectfully except. In fairness to the Court I want to say that I am quoting from one of the cases, and I am pointing out that if someone goes there for that purpose, only that, even though a seeker after the sensual and degrading parts of a play may find in some part of this play something to satisfy his pruriency, that it is not sufficient for the jury to convict.

The Court: I will not charge in that language.

Exception.

Mr. Weinberger: I ask your Honor to charge that even though a seeker after the sensual or degrading parts of a play may find in some part of this play something to satisfy his pruriency the jury must still acquit if they are not

convinced beyond a reasonable doubt that this play is pornographic and solely for the purpose of exciting lustful and lecherous desires, but on the contrary find that it is a drama representing a real problem of life and pointing a moral.

The Court: Pornographic means a description of prostitutes and their conduct. It pertains to obscene literature. You are using the word pornographic in a case of this character when it is not applicable here at all.

Mr. Weinberger: Exception. I ask your Honor to charge that even if the jury should be convinced beyond a reasonable doubt that some of the language or business on the stage taken by themselves are vulgar and indecent they must still acquit if the entire play has a serious moral purpose, and they must not judge the entire play from a mere slection of any part or any small portion of the language or business on the stage, even though such part of the business or language on the stage might, as a matter of law, come within the prohibition of the statute.

The Court: I decline to charge except as I have charged upon that branch of the case.

Exception.

Mr. Weinberger: I ask your Honor to charge that even if some of the phrases of the play are offensive to the taste of our day or to the taste of the jury, yet they cannot find the defendants guilty.

The Court: I am not going to deprive the jury of determining the question of fact here. It is for you to say; I cannot charge in that language.

Exception.

Mr. Weinberger: I ask your Honor to charge that the

jury must apply the simple test of literature as distinct from the mere portrayal of the obscene.

The Court: Are you going to ask me to tell these jurors to apply a test that would be applied by litterateurs? I do not think it is contended here that these gentlemen in the box are professional litterateurs.

Mr. Weinberger: I have not said so.

The Court: They are to apply the test of common sense, that is all.

Mr. Weinberger: The test of common sense and take into consideration the world's literature and the world's drama. I respectfully except to your Honor's refusal.

The Court: I regret to say that the Judge presiding at this trial is not familiar with the world's literature or the world's drama. Occasionally I have an opportunity to read, but I never could retain all the facts of the world's drama and the world's literature.

Mr. Weinberger: I mean, if your Honor please, that we are all ordinary, everyday people, but we have a certain interest in literature and in the drama. I ask the Court to charge that as far as they remember their literature and the drama that they can take that as a measuring stick and measure this drama as part of the world's drama.

The Court: I am not going to ask them to take a measuring stick into the jury room. They can use their own good common sense based on the evidence.

Mr. Weinberger: Exception. I ask your Honor to charge the jury that unless they find that this play makes vice alluring and attractive to youth or others they must acquit.

The Court: I cannot find the word alluring in the

statute.

Mr. Weinberger: I quote from the People against Eastman and the People against Brainerd, which is the interpretation which the Court of Appeals puts on this particular statute.

The Court: That is another case referring to books and not to plays.

Mr. Weinberger: I take an exception to your Honor's statement and to your refusal to charge.

The Court: I have laid down the rules for the guidance of the jury and I shall not charge except as charged upon that branch of the case. Now, gentlemen, you may retire.

A Juror: May I ask that we have the program?

(By consent of counsel, the jury take Exhibit No.1)

the court instructs the jury
that the indictment prepared against 354
the defendant in this case is a mere
formal accusation, and is of itself no
evidence whatever of his guilt. Before
the jury can find the defendant guilty
they must believe and find from the
evidence before them, and that beyond
all reasonable doubt, that he, the
said defendant, and in the manner and
by some of the means mentioned in the
said indictment, willfully intentionally,
deliberately, and premeditatedly, or purpose,
and with malice aforethought, did kill
the said . And the court
further instructs the jury that by
the term 'reasonable doubt' is meant
that state of the case which, after
the entire comparison & consideration
of the evidence, leaves the minds
of the jurors in that condition
that they cannot say they feel an
abiding conviction to a moral certainty
that the charge is true."

State v Harrell, 117 Mo. 307, 23 S.W. 263

Suffolk November 26,1894 - June 24,1895.

Present: Field, C.J.Allen,Holmes,Knowlton, Morton,Lathrop & Barker, JJ.

FIELD, C.J. This is an indictment under St.1890, c.70.

The defendant is charged with "knowingly,unlawfully, feloniously,wickedly, and scandalously " selling "to one Jefferson H. Parker a certain book, then and there called 'The Decameron of Boccaccio,' and which said book, upon the title-page thereof, was then and there of the tenor following, that is to say, 'The Decameron; or Ten Days' Entertainment of Boccaccio. A revised translation by W.K.Kelly, with portrait and ten illustrations, drawn and engraved by Leopold Flameng. Published for the Trade,' - and which said book then and there contained, among other things, certain obscene, indecent, and impure language, and manifestly tending to the corruption of the morals of youth, which said book is so lewd, obscene, indecent, and impure that the same would be offensive to the court here and improper to be placed upon the records thereof, wherefore said jurors do not set forth the same in this indictment," etc. The defendant moved to quash the indictment for this among other reasons, that "the indictment sets forth in no legal and sufficient terms wherein said book is amenable to the penalties denounced by the statute; no specifications of any offending passage is (sic) exhibited." This motion was overruled, and the defendant excepted.

The exceptions also recite as follows: "The government introduced in evidence the book described in the indictment, and caused to be read the following passages from the said book: (a) Novel 1, Third Day; Novel 2, Fourth Day; Novel 4, Fifth Day; Novel 7, Sixth Day; Novel 8, Eighth Day; Novel 6, Ninth Day. No evidence of the character of the book was adduced by the Commonwealth other than the book itself." (b) The book introduced in evidence is a volume of 710 printed pages, most of which are in the English language, but a few pages are in the original Italian language, with a translation of these into the French language appended. There is a short preface, and at the end of some of the novels are short historical notes by the translator, and each day's entertainment is preceded by an introduction. The Decameron of Boccaccio is a book well known to students of literature, and contains ten novels or stories for each of ten days' entertainment. Of these one hundred novels six only were introduced in evidence by the Commonwealth. We cannot know what parts of the book the grand jury found to obscene, indecent, and impure and we know of no way whereby from the indictment the defendant could know before the trial what parts of the book would be put in evidence by the Commonwealth.

The first precedent,so far as we know, for an indictment in this form, is the second count of the indictment in Commonwealth v. Holmes 17 Mass.336. In that case the court say: "The second and fifth counts in this indictment are certainly good; for it can never be required that an obscene book and pictures should be displayed upon the records of the court;

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The defendant is charged with "knowingly,unlawfully, feloniously,wickedly, and scandalously " selling "to one Jefferson H. Parker a certain book, then and there called 'The Decameron of Boccaccio,' and which said book, upon the title-page thereof, was then and there of the tenor following, that is to say, 'The Decameron; or Ten Days' Entertainment of Boccaccio. A revised translation by W.K.Kelly, with portrait and ten illustrations, drawn and engraved by Leopold Flameng. Published for the Trade,' - and which said book then and there contained, among other things, certain obscene, indecent, and impure language, and manifestly tending to the corruption of the morals of youth, which said book is so lewd, obscene, indecent, and impure that the same would be offensive to the court here and improper to be placed upon the records thereof, wherefore said jurors do not set forth the same in this indictment," etc. The defendant moved to quash the indictment for this among other reasons, that "the indictment sets forth in no legal and sufficient terms wherein said book is amenable to the penalties denounced by the statute; no specifications of any offending passage is (sic) exhibited." This motion was overruled, and the defendant excepted.

The exceptions also recite as follows: "The government introduced in evidence the book described in the indictment, and caused to be read the following passages from the said book: (a) Novel 1, Third Day; Novel 2, Fourth Day; Novel 4, Fifth Day; Novel 7, Sixth Day; Novel 8, Eighth Day; Novel 6, Ninth Day. No evidence of the character of the book was adduced by the Commonwealth other than the book itself." (b) The book introduced in evidence is a volume of 710 printed pages, most of which are in the English language, but a few pages are in the original Italian language, with a translation of these into the French language appended. There is a short preface, and at the end of some of the novels are short historical notes by the translator, and each day's entertainment is preceded by an introduction. The Decameron of Boccaccio is a book well known to students of literature, and contains ten novels or stories for each of ten days' entertainment. Of these one hundred novels six only were introduced in evidence by the Commonwealth. We cannot know what parts of the book the grand jury found to obscene, indecent, and impure and we know of no way whereby from the indictment the defendant could know before the trial what parts of the book would be put in evidence by the Commonwealth.

The first precedent,so far as we know, for an indictment in this form, is the second count of the indictment in Commonwealth v. Holmes 17 Mass.336. In that case the court say: "The second and fifth counts in this indictment are certainly good; for it can never be required that an obscene book and pictures should be displayed upon the records of the court;